



## PRACTICAL TREATISE

OF

### THE LAW

OF

# VENDORS AND PURCHASERS

OF

# ESTATES.

BY SIR EDWARD SUGDEN.

BONÆ FIDEI VENDITOREM, NEC COMMODORUM SPEM AUGERE, NEC
INCOMMODORUM COGNITIONEM OBSCURARE OPORTET.

Valerius Maximus, l. vii. c. 11.

FROM THE NINTH LONDON EDITION.

WITH NOTES AND REFERENCES TO AMERICAN DECISIONS.

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## ADVERTISEMENT.

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THE recent Decisions have been introduced into their proper places; and references have been made to all the Reports of the modern Cases, as few have on their shelves all the contemporaneous Reporters. The language of the Law has been altered by the Real Property Acts, and the text of this work has accordingly throughout required alteration. No apology is necessary for introducing a view of those Acts in the Chapter upon TITLE, as it is of deep importance that their contents should be readily accessible. To prevent the too frequent recurrence of new Editions, the Writer has been induced to add upon this occasion considerably to the usual number of copies; and as that will deprive him of an early opportunity of again correcting the Work, he has revised it, with a view to this Edition, with all the care and attention which his opportunities have permitted.

Lincoln's Inn, 17th May, 1834.

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#### THE LAW

OF

## VENDORS AND PURCHASERS

OF

## ESTATES.

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#### INTRODUCTION.

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Moral writers insist (a), that a vendor is bound, in foro conscientiæ, to acquaint a purchaser with the defects of the subject of the contract. Arguments of some force have, however, been advanced in favor of the contrary doctrine; and our law does not entirely coincide with this strict precept of morality(b).

If a person enter into a contract, with full knowledge of all the defects in the estate, the question cannot arise: scientia enim utrinque par pares facit contrahentes(c).

So if, at the time of the contract, the vendor himself was not aware of any defect in the estate, it seems that the purchaser must take the estate with all its faults, and cannot claim any compensation for them.

- (a) Cic. de Off. 3. 13; Grotius de Jure Belli ac Pacis, l. 2. c. 12. s. 9; Puffendorf de Jure Naturæ et Gentium, l. 5. c. 3. s. 2; Puffendorf de Off. l. 1. c. 15. s. 3; Valerius Maximus, l. 8. c. 11; et vide Deuteronomy xxv. 14; Paley's Moral Philosophy, vol. 1. b. 3. ch. 7.
  - (b) Vide Infra, ch. 6.
- (c) Grotius de Jure Belli ac Pacis, l. 2. c. 12. s. 9. 3; Puffendorf de Jure Naturæ et Gentium, l. 5. c. 3. s. 5.

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And even if the purchaser was, at the time of the contract, ignorant of the defects, and the vendor was acquainted with them, and did not disclose them to the purchaser; yet, if they were *patent*, and could have been discovered by a vigilant man, no relief will be granted against the vendor.

The disclosure of even patent defects in the subject of a contract, may be allowed to be a moral duty; but it is what the civilians term a duty of imperfect obligation. Vigilantibus, non dormientibus jura subveniunt, is an ancient maxim of our law, and forms an insurmountable barrier against the claims of an improvident purchaser.

In this respect, equity follows the law. But it has been decided, that if a vendor during the treaty, industriously prevent the purchaser from seeing a defect which might otherwise have easily been discovered, he is not entitled to the extraordinary aid of a court of equity: and it is conceived, that he could not even sustain an action against a purchaser for a breach of the contract.

And if the vendor know that there is a *latent* defect in his estate, which the purchaser could not, by any attention whatever, possibly discover, it is not clear that he is not bound to disclose his knowledge, although the estate be

sold, expressly subject to all its faults(d).

By the civil law, vendors were bound to warrant both the title and estate against all defects, whether they were or were not conusant of them. To prevent the inconveniences which would have inevitably resulted from this general doctrine, it was qualified by holding, that if the defects of the subject of the contract were evident, or the buyer might have known them by proper precaution, he could not obtain any relief against the vendor.

The rule of the civil law also was, "simplex commendatio non obligat." If the seller merely made use of those

<sup>(</sup>d) See post. ch. 6. s. 2.

expressions, which are usual to sellers, who praise at random the goods which they are desirous to sell, the buyer, who ought not to have relied upon such vague expressions, could not, upon this pretext, procure the sale to be dissolved(e).

The same rule prevails in our law(f), and has received a very lax construction in favor of vendors. It has been decided, that no relief lies against a vendor for having falsely affirmed, that a person bid a particular sum for the estate, although the vendee was thereby induced to purchase it, and was deceived in the value(g).

Neither can a purchaser obtain any relief against a vendor for false affirmation of value(h); it being deemed the purchaser's own folly to credit a nude assertion of that nature. Besides, value consists in judgment and estimation, in which many men differ. So, where a church lease was described in the particulars of sale, as being nearly of equal value with a freehold, and renewable every ten years, upon payment of a small fine, the purchaser was not allowed any abatement in his purchasemoney, although the fine was very considerable, and it was proved that the steward of the estate had remonstrated with the vendor, before the sale, upon his false description(i). And a statement in the particulars of an advowson, that an avoidance of the preferment was likely to occur soon, was held to be so vague and indefinite, that the Court could not take notice of it judicially; and

<sup>(</sup>e) 1 Dom. 85.

<sup>(</sup>f) Chandelor v. Lopus, Cro. Jac. 4.

<sup>(</sup>g) 1 Roll. Abr. 101. pl. 16. See 1 Sid. 146; Kinnaird v. Lord Dean, stated infra, n.; Dawes v. King, 1 Stark. 75.

<sup>(</sup>h) Harvey v. Young, Yelv. 20. See Duckenfield v. Whichcott, 2 Cha. Ca. 204; see Ekins v. Tresham, 1 Lev. 102; reported 1 Sid. 146, by the name of Leakins v. Clissel.

<sup>(</sup>i) Brown v. Fenton, Rolls, 23 June 1807, MS.; S. C. 14 Ves. jun. 144.

that its only effect ought to have been, to put the purchaser upon making inquiries respecting the circumstances under which the alleged avoidance was likely to take place, previous to his becoming the purchaser(k). So a statement, that the property is uncommonly rich water meadow land, will not annul the contract, although the land is imperfectly watered(l).

But if a vendor affirm, that the estate was valued by persons of judgment, at a greater price than it actually was, and the purchaser act upon such misrepresentation, the vendor cannot compel the execution of the contract in equity(m), nor would be, it should seem, be permitted to maintain an action at law for non-performance of the agreement.

And a remedy will lie against a vendor, for falsely affirming that a greater rent is paid for the estate than is actually reserved(n)(I); because that is a circumstance within his own knowledge. The purchaser is not bound

- (k) Trower v. Newcome, 3 Mer. 704.
- (1) Scott v. Hanson, 1 Sim. 13.
- (m) Buxton v. Cooper, 3 Atk. 383; S. C. MS.; see Partridge v. Usborne, 5 Russ. 195; Small v. Attwood, 1 You. Rep. 407, now in D. P. upon appeal.
- (n) Eikins v. Tresham, ubi sup.; Lysney v. Selby, 2 Lord Raym. 1118; 1 Salk. 211, S. C. nom. Risney v. Selby; Dobell v. Stevens, 3 Barn. & Cress. 623; Small v. Attwood, 1 You. Rep. 40?.

<sup>(</sup>I) In the 1st vol. of Coll. of Decis. p. 332, the following case is reported:—An heritor having solemnly affirmed to his tacksman at setting the lands, that there was paid, by the preceding tenants, for each acre, a great deal more than really was paid, and thereby induced him to take it at a very exorbitant rate, whereby he was leased ultra dimidium; yet continued to possess two years before he complained. The Lords found the allegiance of circumvention and fraud, both in consilio and in eventu, not sufficient to reduce the tack, and that the tenant should have informed himself better what was the true rent, and not have relied on the setter's assertion, and ought to have tried the quality of the ground, and, his eye being his merchant, he had none to blame but himself, especially now that he had acquiesced two years. Kinnaird v. Lord Dean.

to inquire further: for the leases may be made by parol, and the tenants may refuse to inform the purchaser what rent they pay; or the tenants may combine with the landlord, under whose power they frequently are, and so misinform and cheat the purchaser. It has been decided also. after great consideration(o), that a purchaser may recover against a vendor for false affirmation of rent, although he did not depend upon the statement, but inquired what the estate let for. Where it can be satisfactorily proved. that the purchaser did not rely upon the vendor's assertion, a jury would undoubtedly give but trifling damages.

It seems that the same remedy will lie against a person not interested in the property, for making a false representation to a purchaser of value or rent, as might be resorted to in case such person were owner of the estate(p); but the statement must be made fraudulently, that is, with an intention to deceive; whether it be to favor the owner, or from an expectation of advantage to the party himself, or from ill-will towards the other, or from mere wantonness, appears to be immaterial (q).

And in cases of this nature it will be sufficient proof of fraud to show, first, that the fact, as represented, is false: secondly, that the person making the representation had a knowledge of a fact contrary to it. The injured party cannot dive into the secret recesses of the other's heart, so as to know whether he did or did not recollect the fact: and therefore, it is no excuse in the party, who made the representation, to say, that though he had received in-

<sup>(</sup>o) Lysney v. Selby, ubi sup.

<sup>(</sup>p) Pasley v. Freemen, 3 Term Rep. 51; Eyre v. Dunsford, 1 East, 318; Ex parte Carr, 3 Ves. & Bea. 108.

<sup>(</sup>q) Haycraft v. Creasy, 2 East, 92; Tapp v. Lee, 3 Bos. & Pull. 367; and see 6 Ves. jun. 186; 13 Ves. jun. 134; 12 East, 634, n.; Hutchinson v. Bell, 1 Taunt. 558; De Graves v. Smith, 2 Camp. Ca. 533; Foster v. Charles, 7 Bing. 106; S. C. 4 Moo. & P. 61 and 741; Corbett v. Brown, 2 Mood. & Malk. 108; S. C. 5 Carr. & P. 363.

formation of the fact, he did not at that time recollect it(r).

A purchaser is not liable to an action of deceit for misrepresenting the seller's chance of sale, or the probability of his getting a better price for his commodity than the price which such proposed buyer offers(s). Nor is a purchaser bound to acquaint the vendor with any latent advantage in the estate: for instance, if a purchaser has discovered that there is a mine under the estate, he is not bound to disclose that circumstance to the vendor, although he knows the vendor is ignorant of it(t). Equity will not, however, interfere in favor of a purchaser who has misrepresented the estate to any person who had a desire of purchasing it(u).

And a very little is sufficient to affect the application of this principle. If, it has been said, a word, a single word be dropped which tends to mislead the vendor, that

principle will not be allowed to operate(x).

And if a purchaser conceal the fact of the death of a person of which the other is ignorant, and by which the value of the property is increased, equity will set aside the contract(y).

The same rules apply to incumbrances and defects in the title to an estate, as to defects in the estate itself. Both law and equity require the vendor to deliver to the purchaser the instrument by which the incumbrances were created, or on which the defects arise; or to acquaint him with the facts, if they do not appear on the title-deeds. If a vendor neglect this, he is guilty of a

<sup>(</sup>r) Burrowes v. Lock, 10 Ves. jun. 470, per Sir Wm. Grant.

<sup>(</sup>s) See Vernon v. Keys, 12 East, 632.

<sup>(</sup>t) See 2 Bro. C. C. 420.

<sup>(</sup>u) See Howard v. Hopkyns, 2 Atk. 371; Young v. Clerk, Prec. Cha. 538.

<sup>(</sup>x) Per Lord Eldon, 1 Jac. 178.

<sup>(</sup>y) Turner v. Harvey, 1 Jac. 169.

direct fraud, which the purchaser, however vigilant, has no means of discovering: and Lord Hardwicke laid it down(z), "that even if an attorney of a vendor of an estate, knowing of incumbrances thereon, treat for his client in the sale thereof, without disclosing them to the purchaser or contractor, knowing him a stranger thereto, but represents it so as to induce a buyer to trust his money upon it, a remedy lies against him in equity(a): to which principle it is necessary for the court to adhere, to preserve integrity and fair dealing between man and man; most transactions being by the intervention of an attorney or solicitor."

The same observation applies, and indeed with much greater force, to the attorney or agent of the purchaser. It can seldom happen that the attorney or agent of the purchaser is conusant of any incumbrance on the estate intended to be purchased, unless he be employed by both parties; which the same person frequently is, in order to save expense. This practice has been discountenanced by the courts(b), and is often productive of the most serious consequences; for it not rarely happens, that there are incumbrances on an estate which can be sustained in equity only, and which will not bind a purchaser who obtains the legal estate, unless he had notice of them previously to completing his purchase. Now notice(c) to an agent, although one concerned for both parties, is treated in equity as notice to the purchaser himself; and, therefore, if the attorney know of any equitable incumbrance, the purchaser will be bound by it, although he himself was not aware of its existence.

<sup>(</sup>z) Per Lord Hardwicke, 1 Ves. 96; and see 6 Ves. jun. 193; Burrowes v. Lock, 10 Ves. jun. 470; and Bowles v. Stewart, 1 Sch. and Lef. 227.

<sup>(</sup>a) It seems clear that relief might now be obtained at law.

<sup>(</sup>b) See 6 Ves. jun. 631, n.

<sup>(</sup>c) See infra, ch. 17.

And by these means, a purchaser may even deprive himself of the benefit to be derived from the estate lying in a register county: the register may be searched, and no incumbrance appear; yet, if the attorney have notice of any unregistered incumbrance, equity will assist the incumbrancer in establishing his demand against the purchaser (d).

Another powerful reason why a purchaser should not employ the vendor's attorney is, that if the vendor be guilty of a fraud in the sale of the estate, to which the attorney is privy, the purchaser, although it be proved that he was innocent, will be responsible for the misconduct of his agent(e). In one case(f), a purchaser lost an estate, for which he gave nearly 8,000l., merely by employing the vendor's attorney, who was privy to a fraudulent disposition of the purchase money.

But it has been decided that the grantor of an annuity is not bound to lay open to the intended grantee all the circumstances of his situation: he is only bound to give honest answers to questions put to him by the intended grantee. If the grantee employ the grantor's attorney to prepare the deeds, the mere preparation of the deeds does not place him in a confidential relation towards the grantee; and as the agent of the grantor stands in his situation, he is not bound to do more than his principal(g).

With the exception of a vendor, or his agent, suppressing an incumbrance, or a defect in the title, it seems clear, that a purchaser cannot obtain relief against a vendor for any incumbrance, or defect in the title, to which his covenants do not extend; and therefore if a pur-

(e) See Bowles v. Stewart, 1 Sch. & Lef. 227.

<sup>(</sup>d) See infra, ch. 16, 17.

<sup>(</sup>f) Doe v. Martin, 4 Term Rep. 39: Hicks v. Morant, 3 You. & Jerv. 286; 2 Dow & Clark. 414.

<sup>(</sup>g) Adamson v. Evitt, 2 Russ. & Myl. 66.

chaser neglect to have the title investigated, or his counsel overlook any defect in it, it appears to be without a remedy(h).

To sum up the foregoing observations,—a purchaser is entitled to relief, on account of any latent defects in the estate, or in the title to the estate, which were not disclosed to him, and of which the vendor, or his agent, was aware. In addition to this protection afforded him by the law, a provident purchaser will examine and ascertain the quality and value of the estate, and not trust to the description and representation of the vendor or his agents; he will employ an agent and attorney not concerned for the vendor, and will have the title to the estate inspected by counsel(I).

Where it is stated upon a sale, even by auction, that the estate is in lease, and there is no misrepresentation, the purchaser will not be entitled to any compensation, although there are covenants in the lease contrary to the custom of the country; because, whoever buys with notice of a lease, is held conusant of all its contents(i). This rule, it should seem, ought, as between a vendor and purchaser, to have been confined to a contract actually executed by the conveyance of the estate and payment of the purchase-money; but as the point has been thus decided, no person having

<sup>(</sup>h) See post, ch. 9.

<sup>(</sup>i) Hall v. Smith, Rolls, 18 Dec. 1807, MS.; S. C. 14 Ves. jun. 426; Walter v. Maunde, 1 Jac. & Walk. 181; Barraud v. Archer, 2 Sim. 437.

<sup>(</sup>I) This can seldom be effectually done, unless the abstract be carefully compared with the title-deeds: in doing which, the attention should be particularly directed to the descriptions of the parties, the recitals, the parcels, and the covenants for quiet enjoyment, free from incumbrances; which frequently lead to incumbrances and facts which have been suppressed. This should be particularly attended to, as a purchaser is bound by every deed or fact, to which an instrument in his possession leads, by recital or description. See post, ch. 16.

notice of any lease, or that the estate is in the occupation of tenants, should sign a contract for purchase of the estate without first seeing the leases, unless the vendor will stipulate that they contain such covenants only as are justified by the custom of the country.

With respect to incumbrances, it remains to remark, that if a purchaser suspect any person has a claim on the estate which he has contracted to buy, he should inquire the fact of him, at the same time stating that he intends to purchase the estate; and if the person of whom the inquiry is made has an incumbrance on the estate, and deny it, equity would not afterwards permit him to enforce his demand against the purchaser(j).

The inquiry should be made before proper witnesses; and as a witness may refresh his memory by looking at any paper if he can afterwards swear to the facts from his own memory, it seems advisable that the witnesses should take a note of what passes(k).

Where difficulties arise in making out a good title, the purchaser should not take possession of the estate until every obstacle is removed. Purchasers frequently take this step, under an impression, that it gives them an advantage over the vendor; but this is a false notion; such a measure would, in many cases, be deemed an acceptance of the title(l), or would at least be a ground to leave it to a jury, to consider whether the party had not taken possession with an intention to wave all objections. Where a purchaser, after delivery to him of the abstract, which disclosed a reservation of a right of sporting not noticed in

<sup>(</sup>j) Ibbetson v. Rhodes, 2 Vern. 554; Amy's case, 2 Cha. Ca. 128, cited.

<sup>(</sup>k) See Doe v. Perkins, 3 Term Rep. 749, and the cases there cited; Burrough v. Martin, 2 Camp. 112.

<sup>(</sup>l) See 3 P. Wms. 193; Calcraft v. Roebuck, 1 Ves. jun. 226; 12 Ves. jun. 27; and Vancouver v. Bliss, 11 Ves. jun. 464.

the particulars by which he purchased, upon his application was let into possession, and paid the greater part of the purchase-money, without objecting to the right reserved, and apologized for not sending the draft of the conveyance, and afterwards raised the objection, he was held bound by his conduct, which was considered as a waver of the objection; and although a clerk of the seller's solicitor wrote in answer to the purchaser's application for compensation, that a reasonable compensation would be allowed, yet this was not deemed binding, as he had no authority to make such an offer(m).

If, however, the objections to the title be remediable, and the purchaser be desirous to enter on the estate, he may in most cases venture to do so; provided the vendor will sign a memorandum, importing that the possession taken by the purchaser, shall not be deemed a waver of the objections to the title, or be made a ground for compelling him to pay the purchase-money into court, in case a bill be filed, before the conveyance to him is executed. And a purchaser may, with the concurrence of the vendor. safely take possession of the estate at the time the contract is entered into, as he cannot be held to have waved objections, of which he was not aware; and if the purchase cannot be completed on account of objections to the title. he will not be bound to pay any rent for the estate, unless perhaps the occupation of it has been beneficial to him(n).

A purchaser of any equitable right, of which immediate possession cannot be obtained, should, previously to completing his contract, inquire of the trustee, in whom the property is vested, whether it is liable to any incumbrance. If the trustee make a false representation, equity would

<sup>(</sup>m) Burnell v. Brown, 1 Jac. & Walk. 168.

<sup>(</sup>n) Hearne v. Tomlin, Peake's Ca. 192; see Kirtland v. Pounsett, 2 Taunt. 145; Stevens v. Guppy, 3 Russ. 171.

compel him to make good the loss sustained by the purchaser, in consequence of the fraudulent statement (o). When the contract is completed, the purchaser should give notice of the sale to the trustee. The notice would certainly affect the conscience of the trustee, so as to make him liable in equity, should he convey the legal estate to any subsequent purchaser; and it would also give the purchaser a priority over any former purchaser, or incumbrancer, who had neglected the same precaution (p).

Auctioneers usually prepare the particulars and conditions of sale; but this a vendor should not permit, as continual disputes arise from the mis-statements consequent upon their ignorance of the title to the estate.

Where an estate has been in a family for a long time, or the title has not been recently investigated, it will be advisable for the owner to have an abstract of his title submitted to counsel, and any objections which occur to it cleared up, previously to a contract being entered into for sale of the estate. By this precaution, the vendor will prevent any delay on his part, which might impede the sale from being carried into effect by the time stipulated; and will, in many cases, avoid the expense necessarily attending tedious discussions of a title. Another advantage is, that if there should be any defect in the title which cannot be cured, it would be known only to the agents and counsel of the vendor. It is of the utmost importance to keep defects in a title from the knowledge of persons not concerned for the owner. It has frequently happened, that persons concerned for purchasers, have communicated fatal defects in a vendor's title, to the person interested in taking advantage of them, by which many titles have been disturbed.

<sup>(</sup>o) Burrowes v. Lock, 10 Vcs. jun. 470.

<sup>(</sup>p) Vide infra, ch. 16.

### CHAPTER I.

OF SALES BY AUCTION AND PRIVATE CONTRACT.

1. By three acts(a) of his late Majesty's reign, a duty is imposed of 7d. for every twenty shillings of the purchase-money, which shall arise or be payable by virtue of any sale at auction in Great Britain, of any interest in possession or reversion, in any freehold, copyhold, or leasehold lands, tenements, houses, or hereditaments.

But sales by way of auction, of estates under the decree of the Court of Chancery, or Exchequer, in England; or of the Court of Session, or Exchequer, in Scotland(b), are not liable to the duty; nor do the acts extend to auctions held on the account of the lord or lady of any manor, for granting copyhold or customary lands, for lives or years; or to any auction held for the letting any estate for lives or years to be created by the persons on whose accounts such auctions shall be held(c)(I): neither does the duty attach upon the purchase-money of any estate sold under a sheriff's authority, for the benefit of creditors, in execution of any judgment; nor to the purchase-money of any bankrupt's estate, sold by order of the assignees under any commission of bankruptcy(d). And, lastly, no auction duty is payable in respect of monies produced

<sup>(</sup>a) 27 Geo. III. c. 13. s. 36; 37 Geo. III. c. 14; and 45 Geo. III. c. 30.

<sup>(</sup>b) 19 Geo. III. c. 56. s. 13.

<sup>(</sup>c) Id. s. 14.

<sup>(</sup>d) Id. s. 15.

<sup>(</sup>I) This mode of letting estates, is adopted by the City of London, and some other public bodies.

by sale of estates, sold by auction, for the redemption of land tax(e).

By an order of Lord Rosslyn's (f), it is directed, that upon application by a mortgagee of a bankrupt's estate, the mortgaged estate shall be sold before the commissioners, or by public auction, if they shall think fit. And it has been decided(g), that a sale of a mortgaged estate by auction, under this order, is liable to the auction duty, and is not within the exception in the acts of sales of bankrupts estates by the order of the assignees. This decision was made at nisi prius, and, perhaps, cannot be supported. The Legislature intended that the creditors of bankrupts should have the advantage of selling the estates by auction without being charged with the auction duty. Now this intention is, in the case under consideration, clearly subverted by the decision in Coare v. Creed. The argument was, that the sale was by the mortgagee, and so not part of the bankrupt's estate. But if the money produced by sale of the pledge is insufficient to cover the mortgagee's debt, he of course resorts to the general effects for a dividend on the residue. If the pledge produce more, the surplus sinks into the general fund; so that assuming, as the Legislature clearly did, that the auction duty is in substance a charge on the land, it in this case takes so much from the bankrupt's property, distributable for the benefit of his creditors. It was considered to be clear, however, that where the estate was sold by order of the assignees, with the consent of the mortgagee, no duty would be payable. But it has been decided, that a sale by assignees of an estate in fee, which was in mortgage for a term of years, was liable to the auction duty, because the assignees sold the whole

<sup>(</sup>e) 42 Geo. III. c. 116. s. 113.

<sup>(</sup>f) 4 Bro. C. C. at the end.

<sup>(</sup>g) Coare v. Creed, 2 Esp. Ca. 699.

estate, and they had only the equity of redemption(h). But the act of Parliament draws no such distinction. Most bankrupts estates are in mortgage; and the exception would indeed be illusory, if it only extended to estates upon which there was no incumbrance. The simple question, however, is, whether such a sale is not a bona fide sale by order of the assignees? It seems, indeed, to have been considered, that the mortgagee had the property, and the bankrupt had only the equity of redemption. But, even at law, the bankrupt had the fee-simple in reversion expectant upon the term of years in the mortgage, and in equity he was owner of the fee in possession, subject to the debt. The case of the King v. Abbott went far beyond the case of Coare v. Creed. To avoid the effect of these decisions, assignees must, in future, sell the estate subject to the mortgage. The purchaser must, of course, pay off the mortgage; and therefore, by the insertion of a few words in the particulars, the creditors may obtain the relief which the Legislature intended to grant them.

The words of the late act(i) are, that "all sales of any real or personal estate of any bankrupt or bankrupts shall not be liable to any auction duty," which may probably remove all difficulty upon this point. Since these observations were published, the point came before the Court of Exchequer upon a sale by auction, by assignees, of the absolute interest in fee of an estate of the bankrupt in mortgage; and it was held, that the duty was not payable (j). Upon a writ of error in the Exchequer Chamber the judges were divided in opinion, and the judgment below was affirmed, in order that the question

<sup>(</sup>h) Rex v. Abbott, Excheq. Mich. T. 1816, MS.; 3 Price, 178.

<sup>(</sup>i) 6 Geo. IV. c. 16. s. 98.

<sup>(</sup>j) Rex v. Winstanley, 3 You. & Jerv. 124. 2 Dow & Clark, 302.

might be disposed of in the House of Lords(k), and there the judgment has been affirmed (l). Two questions were put to the judges: 1st. whether, when a trader, having real estates under mortgage, becomes a bankrupt, and the whole interests in the estates are sold, by order of the assignees, for the benefit of the creditors, and no concurrence on the part of the mortgagees appears, the auction duty is payable on the whole of the sum received for the estates, or on any and what part of it: 2dly. Whether, when a trader, having estates in mortgage, afterwards conveys the estates to trustees, and then becomes bankrupt, and the whole interest in the estates are sold by the assignees, with the concurrence of the trustees, it not appearing that the mortgagees were consulted, the auction duty is payable on the whole or any part of the sum received for the estates.

Mr. Justice Bayley delivered the unanimous opinion of the judges, in answer to both questions, that the auction duty was not payable on the whole or any part of the sum; observing, that if this had been a sale by the mortgagee, the matter might have stood on a different footing. Lord Wynford observed that he was in the court below when this case was decided there, and he differed in opinion from the rest of the judges. He was happy to say, however, that, upon fuller consideration, he was convinced that they were right and he was wrong. His puzzle was about the word estate, and whether the estate in question, being in mortgage, could be considered as the estate of the bankrupt. But he was now satisfied that, speaking in ordinary language, this is the estate of the bankrupt, clogged with the debt of the creditor. The mortgage is merely a security, and every other in-

<sup>(</sup>k) 3 You. & Jerv. 126.

<sup>(1) 2</sup> Crompt. & Jerv. 434; 2 Dow & Clark, 302.

terest is in the bankrupt; and therefore, upon a sale of the estate by the commissioners or assignees, the sale is exempt, under these acts of Parliament, from payment of the auction duty. Suppose the bankrupt's funds should not be sufficient to pay the creditors, after paying off the mortgage, the loss must fall on the bankrupt's funds. Suppose the whole subject should be swallowed up by the mortgage, the mortgagee might say that he derived no advantage from the sale beyond the mere payment of his debt. Suppose a third case; that the funds, after payment of the mortgagee and the rest of the creditors, should afford some small surplus for the unfortunate bankrupt, yet the sale being a forced sale, came in principle within the exemption under these acts. He had his doubts as to the soundness of the present judgment, looking to the decision in the case of the King and Abbott; but he was now satisfied that the judgment ought to be affirmed. Lord Tenterden observed that he entirely agreed in the opinion of the Judges. There was some difference in the language of the different acts relating to this subject, which occasioned some doubts; but the words of the statute of 19 Geo. 3. c. 56. s. 15. are, "that nothing therein contained shall extend to charge with auction duty any estate or effects of bankrupts sold by order of the assignees under a commission of bankruptcy." The words of the 43 Geo. 3. are much the same; and then came the case of the King and Abbott. Then followed the Act of the 6 Geo. 4, which enacted, "that all sales of any real or personal estate of any bankrupt or bankrupts shall not be liable to any auction duty;" and the question is whether the estate sold in this case was the estate of the bankrupt within the meaning of these acts. Now, when we look at the words of an act of Parliament, which are not applied to any particular science or art, we are to construe them as they

are understood in common language; and in ordinary speech, the estate, although mortgaged, is still considered as the estate of the mortgagor, and the interest of the mortgagee as merely a security; and, therefore, it appeared to him, that, according to the true construction of the words, this was the estate of the bankrupt within the meaning of the act. If they were to be taken in any other sense, the effect would be to diminish the bankrupt's estate applicable to the payment of the creditors, by the amount of the duty. Upon the whole, it appeared to him, that according to the intention and the words of the act of the 6 Geo. 4, no auction duty was payable on estates sold under such circumstances as the present.

The point therefore is decided against the liability to duty where even the whole estate is sold, provided the mortgagee do not join in the sale; of course, his concurrence in the conveyance will not render the sale liable. The point is still open where the mortgagee does concur in the sale; and therefore where the property is sufficient in value to pay off the mortgage, the sale should be by the assignees alone.

The auctioneer, agent, or seller by commission, is bound to pay the auction duty, which he may deduct out of the money he receives at the sale. If he receive none, he may recover it from the vendor by action.

But if the owner of estates sold by auction, or any other person on his behalf, buy in the same, without fraud or collusion, no auction duty will become payable(m); provided notice be given in writing(n) to the auctioneer before such bidding, signed by the owner and the person intended to be the bidder, of the latter being appointed by the former, and having agreed accordingly to bid at the sale for his use(o); and provided the delivery of such

<sup>(</sup>m) 19 Geo. III. c. 56. s. 12.

<sup>(</sup>n) 28 Geo. III. c. 37. s. 20.

<sup>(</sup>o) See a form of such notice, Appendix, No. 1.

notice be verified by the oath of the auctioneer, as also the fairness of the transaction, to the best of his knowledge.

Neither will the duty be payable where the estate is bought in by, or by the order of the steward (p) or known agent of the owner, actually employed in the management of the sale of such estate; but notice in writing of his intention must be given by the steward or agent, if he himself bid, or by him and the bidder, if he appoint a person to  $\operatorname{bid}(q)$ ; and the delivery of such notice must be verified in the same manner as the delivery of a notice given by the owner. And to exempt a vendor from payment of the duty, every notice must, at the time appointed by law for the auctioneer's passing his account of the sale, be produced by the auctioneer to the officer authorized to pass the account of such sale; and also be left with the officer(r).

It is not necessary that the sale should be a regular auction. The acts apply to every mode of sale, whereby the highest bidder is deemed to be the purchaser. Therefore, where after an auction at which there was no bidding, the seller's agent stated that he should be ready to treat for the sale by private bargain, and the meeting broke up; and the agent shortly afterwards went into a private room, with several of the persons who attended the sale, and he stated that the highest offer above 50,000l. would be accepted; and offers were accordingly made to him, and he having opened them, said that the one which was the highest would be accepted, provided the terms of payment could be adjusted, and these terms having been adjusted, the bargain was concluded the following day; this

<sup>(</sup>p) 42 Geo. III. c. 93. s. 1.

<sup>(</sup>q) See forms of such notices, Appendix, Nos. 2 and 3.

<sup>(</sup>r) 42 Geo. III. c. 93. s. 2.

was held to be within the act. The agent put himself under an obligation to treat with all the persons assembled, and to give the estate to the highest bidder. The question was not, whether this was what was usually called a sale by auction, but whether for the purpose of this act every thing must not be considered as such a sale where the contract was with various persons, with an engagement to let the highest bidder be the purchaser. He might have taken any individual he pleased and concluded a bargain with him; that would have been a transaction of a different kind: but here he treated with a number, and came under an engagement to accept the highest offer(s).

Any thing in the nature of a bidding is within the acts; and therefore where the owner put the price under a candlestick in the room (which is called a dumb bidding), and it was agreed that no bidding should avail if not equal to that, it was holden(t) to be within the acts; as being in effect an actual bidding of so much, for the purpose of superseding smaller biddings at the auction.

Upon such a sale by candlestick biddings, as they are denominated, where the several bidders do not know what the others have offered, a bidding of so much per cent. more than any other person has offered would be binding on the person who makes it(u).

So biddings by several persons of sums marked upon a paper are within the act(v).

So in the case of a female auctioneer who continued silent during the whole time of the sale, but whenever any one bid, she gave him a glass of brandy: the sale

<sup>(</sup>s) Walker v. Advocate-General, 1 Dow, 111.

<sup>(</sup>t) See the case cited, 3 East, 340. Capp v. Topham, infra.

<sup>(</sup>u) 3 Mer. 483, per Lord Eldon.

<sup>(</sup>v) Attorney-General v. Taylor, 13 Price, 636.

broke up, and in a private room he that got the last glass of brandy was declared to be the purchaser. This was decided to be an auction(w).

But to bring a bidding within the acts, the sum must be named by the party *eo intuitu*, with a view to the purchase of the estate. Therefore, in the case of Cruso v. Crisp(x), it was decided, that putting up an estate in lots at certain prices was not a bidding within the acts; but this has since been doubted by Lord Eldon(y); and although it would be difficult to hold the transaction to be a sale within the act, yet of course, although the owner intends only to put up the estate at a certain price, and not to bid for it in case of an advance, a previous notice of his intention should be given.

If an estate be bought in by the owner, and proper notices were not given of his intention to bid, the sale will be held real, and the duty must be paid, however fair the transaction may be. The duty is made a charge on the auctioneer, which he must pay if the proper notices were not given. It is not given by way of penalty. In one case, an auctioneer who had neglected to require proper notices was compelled to pay 5 or 6,000l. out of his own pocket for the duty, although he had not received any part of it from the owners, nor had charged any commission, as the estates were not actually sold(z).

And a statement by an auctioneer to the vendor or his agent, that he has done what is necessary to avoid payment of the duty, will amount to a warranty, although the duty become payable, not by the default, but by the ignorance or mistake of the auctioneer.

<sup>(</sup>w) 1 Dow, 115.

<sup>(</sup>x) 3 East, 337.

<sup>(</sup>y) 1 Dow, 114.

<sup>(</sup>z) Christie v. Attorney-General, 6 Bro. P. C. by Toml. 520; see 3 Ves. Jun. 625, n.

Thus, in the late case of Capp v. Topham(a) an auctioneer put up an estate, and by the conditions of sale reserved a dumb bidding(b) to the owner, which was his mode of saving the payment of the auction duty. The owner's solicitor, with the privity of the auctioneer. placed a ticket containing the price in figures, under a candlestick, on a table in the auction-room. A person who attended on behalf of the owner asked the auctioneer if he had taken the proper precaution to avoid the duty if there was no sale. The auctioneer said, it was his mode to fix a price under the candlestick, and if the bidding should not come up to the price there was no sale or duty. There were several biddings, but under the price fixed, and the auctioneer was compelled to pay the duty(c). He then brought an auction against the owner for recovery of the money as paid to his use; but the statements by the auctioneer were holden to amount to a warranty, and judgment was given for the defendant. Lord Ellenborough said, that even if there was no warranty on the part of the auctioneer, and it was only a mutual error between him and the vendor, he could not call upon his companion in error for a contribution (d). So that in cases of this nature the burden will remain upon the person upon whom it is charged. And it even seems to have been considered, that if an auctioneer, through ignorance, adopt an improper mode of saving the duty, upon an undertaking by the seller to save him harmless, the duty must be paid by the auctioneer, and he cannot recover under the undertaking, because it is illegal to indemnify against penalties(e). But to this it

<sup>(</sup>a) 6 East, 392; 2 Smith, 443.

<sup>(</sup>b) Vide supra.

<sup>(</sup>c) See Christie v. Attorney-General, ubi sup.

<sup>(</sup>d) See Farebrother v. Ansley, 1 Camp. N. P. 343. Jones v. Nanney, 13 Price, 76.

<sup>(</sup>c) Owen v. Parry, Sitt. West. Dec. 6, cor. Lord Ellenborough.

may be objected, that the duty attaches as a charge, and is not imposed as a penalty (f).

If the vendor's title prove bad, the auction duty will be allowed: provided complaint thereof be made before the Commissioners of Excise, or two justices of the peace within whose jurisdiction such sale was made(g), within twelve calendar months after the sale, if the same shall be rendered void in that time; or otherwise within three months after the discovery of the owner having no title(h). But the commissioners will not allow the duty unless they think that the vendor has used his utmost exertions to make a good title. An appeal, however, lies from the judgment of the commissioners: but as the King never pays costs, they fall upon the vendor, and in many cases would amount to more than the duty itself. Where the case is a bona fide one, and the title has been rejected, the commissioners are bound to put a liberal interpretation on the act.

II. According to Cicero(i), a vendor ought not to appoint a puffer to raise the price, nor ought a purchaser to appoint a person to depreciate the value of an estate intended to be sold.(1) And Huber lays it down(j), that if a vendor employs a puffer he shall be compelled to sell the estate to the highest bona fide bidder; because it is against the faith of the agreement, by which it is stipulated that the highest bidder shall be the buyer.

<sup>(</sup>f) Christie v. Attorney-General, 6 Bro. P. C. by Toml. 520. et supra.

<sup>(</sup>g) 19 Geo. III. c. 56. s. 11.

<sup>(</sup>h) 28 Geo. III. c. 37. s. 19.

<sup>(</sup>i) De Off. 1. 3.

<sup>(</sup>j) Prælectiones, xviii. 2. 7.

<sup>(1)</sup> Moncrieff v. Goldsborough, 4 Har. & M'Hen. 282. Troughton's Adm. v. Johnson, 2 Haywood's Rep. 328. Donaldson v. M'Roy, Browne's Rep. 346.

In Bexwell v. Christie(k), Lord Mansfield and the other Judges of B. R. followed the rule of the civil law. and treated a private bidding, by or on the behalf of the vendor, as a fraud; but the Legislature, by the subsequent statutes imposing a duty on sales of estates by auction, seems to have been of a different opinion, and even to have sanctioned it. Lord Rosslyn, who was present at the making of the act, remarked in the case of Conolly v. Parsons, that (l) the acts of Parliament go upon its being an usual thing and a fair thing for the owner to bid. The pressure, when the tax was imposed, was by embarrassing people, who chose to dispose of their goods by auction if they chose to be purchasers, by the tax falling upon them. His Lordship added, that he thought it would have occurred either to Lord Thurlow or to him, when the exception in favor of the owner was proposed, that the case would not exist, as the owner could not be a bidder; or that, for his attempting to do what he could not by law, it would be just that he should pay the duty. It was very wrong to the public to let that clause stand, if at the time it was understood that the owner bidding was doing an illegal thing. The acts do not require an open notice, but only a private notice to the auctioneer, and an oath to prevent the setting up a bidding for the owner that the bidder might evade paying the duty.

Lord Kenyon, however, in the case of Howard v. Castle, where the purchaser was the only real bidder, and there were several puffers(m), clearly coincided with Lord Mansfield's opinion; and held, that unless it was publicly known that the owner intended to bid, it was a fraud upon the purchaser, and consequently no action would lie against

<sup>(</sup>k) H. 16. Geo. III. Cowp. 395.

<sup>(</sup>l) See 3 Ves. jun. 628.

 <sup>(</sup>m) 36 Geo. III; 6 Term Rep. 642. See Twining v. Morris, 2 Bro.
 C. C. 326; and see 3 Term Rep. 93, 95.

him for non-performance of his agreement. The acts of Parliament, he thought, did not intend to interfere with this point, but to leave the civil rights of mankind to be judged of as they were before. And Grose, J. also expressed his opinion, that the doctrine was not in the least impeached by the acts of Parliament.

But in the case of Conolly v. Parsons(n), Lord Rosslyn said, he fancied the foregoing case turned on the circumstance that there was no real bidder; and the person refused instantly. It was one of those trap auctions which are so frequent in this city. The reasoning went large, certainly, and did not at all convince him. He said, he should wish it to undergo a re-consideration; for if it was law, it would reduce every thing to a Dutch auction, by bidding downwards(I). He felt vast difficulty to compass the reasoning, that a person does not follow his own judgment because other persons bid; that the judgment of one person is deluded and influenced by the biddings of others.

## (n) 3 Ves. jun. 625, n.

The manner of conducting sales by auction of the post-horse duties is at once Dutch and English. The duties are put up at a large sum, named in the particulars, and the sale is then conducted in the same manner as a Dutch auction: but when any person actually bids, others may advance on that bidding, and the highest bidder is declared the purchaser; just as if the sale had been conducted in the usual way.

<sup>(</sup>I) A sale of this nature is thus conducted: The estate is put up at a high price, and if nobody accept the offer, a lower is named, and so the sum first required is gradually decreased, till some person close with the offer. Thus there is of necessity only one bidding for the estate, a mode of sale which, in this country, would attract few bidders. In some counties in England a singular mode of sale of estates for redemption of land-tax is adopted; the auctioneer states the sum of money wanted, and the number of acres to be disposed of, and the person who will accept the least quantity of land for the sum required, is declared the purchaser; so that the persons bid downwards, until some one name a quantity of land less than any other will take.

The facts of the case of Conolly v. Parsons do not appear in the report; but I learn, that there was a contest between real bidders, after the person employed to bid on the part of the vendors had desisted from bidding. The suit was compromised by the purchaser paying a considerable sum of money to the vendor to release him from the contract; and consequently Lord Rosslyn did not give judgment; but it seems he was clearly of opinion that the sale was valid.

And in the later case of Bramley v. Alt(o), where an estate was put up to sale by public auction, and an agent for the vendor bid to 75l. an acre, without public notice of his intention to do so; and after a contest with real bidders the estate was bought at 101l. 17s. an acre; Lord Alvanley, then Master of the Rolls, decreed a specific performance with costs. And he concurred with Lord Rosslyn in considering the case of Howard v. Castle only as a decision, that where all the bidders except the purchaser are puffers, the sale shall be void.

In a subsequent case(p), it appeared that assignees of a bankrupt had put up the estate to sale by auction. It was proved that a bidder was employed on their parts to bid up to, but not to exceed 750l., the sum for which the estate was actually sold. The Master of the Rolls held, that the assignees had not committed any fraud, they did not employ the bidder for the purpose, generally, of enhancing the price, but merely to prevent a sale at an undervalue, and they stated, previously, what they conceived to be the true value, below which the lot ought not to be sold. His Honor treated the case of Howard v. Castle as having proceeded on the ground of plain and direct fraud, and said, that in a similar case he should come to a similar conclusion.

By these decisions, therefore, it was settled, that

<sup>(</sup>o) 3 Ves. jun. 620.

<sup>(</sup>p) Smith v. Clarke, 12 Ves. jun. 477.

a bidder may be privately appointed by the owner in order to prevent the estate from being sold at an undervalue; and that if there were real bidders at a sale, it must be supported, although the bidding immediately preceding that of the purchaser was fictitious (q); and that where public notice has been given, the contract will be binding on the purchaser, although there was no contest between real bidders; but only the purchaser and the person employed to bid, bid against each other (r). It should seem that consistently, with the above authorities, the rule would be the same, even where public notice had not been given, provided the bidder was appointed only to protect the vendor's interest. (2)

But where a person is employed, not for the defensive precaution, with a view to prevent a sale at an undervalue, but to take advantage of the eagerness of bidders to screw up the price, that will be deemed a fraud(s).

Neither do the cases authorize the vendor to appoint more than one person on his behalf. It seems highly proper that a vendor should be permitted to appoint a person to guard his interests against the intrigues of bidders; but it does not follow that he may appoint more than one. The only possible object of such a proceeding is fraud. It is simply a mock auction; and, notwithstanding Lord

<sup>(</sup>q) Smith r. Clarke, 12 Ves. jun. 477.

<sup>(</sup>r) Oldfield v. Round, 5 Ves. jun. 508.

<sup>(</sup>s) See 12 Ves. jun. 483. In Fitzgerald v. Forster, 31st July, 1813, the Vice-Chancellor seemed rather to be of opinion that the appointment of one puffer was, in no case, bad.

<sup>(2)</sup> In South Carolina, it has been decided that a person may be employed to bid on the part of the vendor, at a public sale of lands; and the purchaser at such sale will be compelled to complete the purchase, although he had no notice that such person was so employed, and the price at which the land was knocked down, was, by such means, enhanced much beyond its real value. Jenkins v. Hogg, 2 Const. Rep. 821.

Rosslyn's impression, it is universally felt and acknowledged, that the judgments of most men are deluded and influenced by the biddings of others. As far as any aid is sought from the auction-duty acts, in support of private biddings on behalf of the owner, it is clear that they do not authorize or sanction the appointment of more than one person. In the report of Conolly v. Parsons it is stated, that nersons were employed to bid, and did bid for the vendors; but the fact is, that one person only was employed by them, and actually bid on their behalf. The Master of the Rolls observed, in the late case of Smith v. Clarke, that he did not see, that if several bidders were employed by the vendor, in that case, a court of equity would compel the purchaser to carry the agreement into execution; for that must be done merely to enhance the price. It was not necessary for the defensive purpose of protection against a sale at an undervalue(t).

In a later case upon this subject, Lord Tenterden held clearly that the sale was void in point of law, as two persons had been employed to bid, although they were both limited not to go beyond the same fixed sum. The current of authority, therefore, is clearly against the validity of such a sale (u).

In the same case, the learned Judge also expressed his opinion, that if only one person be appointed to bid, with a view to save the auction duty, the sale is void, unless it be announced that there is a person bidding for the owner. The act itself is fraudulent: the statute was made for a different purpose, with a view to the duty only, and cannot be made to sanction what is in itself fraudulent.

And this opinion has since been followed in the Exchequer, where upon a sale by the Crown of an estate seized under an extent, it was stipulated, that "on the part of

<sup>(</sup>t) See 12 Ves. jun. 483; and see 8 Term Rep. 93. 95.

<sup>(</sup>u) Wheeler v. Collier, 1 Mood. & Malk. 123.

the Crown, Mr. E. Driver should be at liberty to make one bidding, but no more, and if the highest bidder, the sale to be void:" and a puffer was employed at the auction by Mr. Driver, the agent for the Crown: the court held that the sale was not binding upon the purchaser. The Court considered it clear, that in an ordinary case the employment of a puffer vitiated the sale, and there was no reason why the Crown should be subject to a different rule(v). But we cannot fail to perceive that in this last case the condition was pregnant with a negative, that no puffer should be employed. The strong leaning of the courts, however, is at present against the validity of a sale where even a single puffer is employed, although after the decisions to the contrary upon this point, which are daily acted upon, it would be difficult to come to such a conclusion, except in the House of Lords.

Although an original purchaser will not be bound where a fraud has been practised in the biddings, yet if he transfer his contract, a strong case of fraud must be made out against the original purchaser, to enable the court to give the benefit of it to his assignee, who was not induced through competition to give the price(v).

If the particulars or advertisements state (as they frequently do) that the estate is to be sold without reserve, it seems clear that the sale would be void against a purchaser, if any person were employed as a puffer, and actually bid at the sale. This was actually decided in the late case of Meadows v. Tanner(w). The Vice-Chancellor said, that the plain meaning of the words without reserve, in a particular of sale, is, that no person will be employed to bid on behalf of the vendor for the purpose of keeping

<sup>(</sup>v) 3 You. and Jer. 331, and see Crowder v. Austin, 3 Bing. 368, 11 Moo. 283.

<sup>(</sup>v) See 12 Ves. jun. 484.

<sup>(</sup>w) 5 Madd. 34.

up the price; and that the vendor could have no claim to the aid of a court of equity to enforce a contract against the purchaser, into which he might have been drawn by the vendor's want of faith.

It is generally understood, that some person will bid on the part of the owner; and it therefore seems to deserve consideration, whether it would not, in most cases, be advisable to give public notice of the owner's intention previously to the sale. Where public notice is given, the mode least liable to objection seems to be that of reserving a bidding, or stipulating in the conditions of sale, that the owner may bid once in the course of the sale(x). It may here, however, be proper to observe, that buying-in an estate, especially where it is done without public notice, mostly prejudices a future sale. This was exemplified in the sale of an estate before one of the Masters in Chancery, where 23,000l. was bona fide bid, and the estate was bought in by the agent of the vendor; afterwards there were three other sales in the Master's office; and the consequence of the estate having been bought-in deterring others from bidding, was, that on the two first occasions no more was offered than 12,000l. and 6,000l.; and the estate finally sold for 15,000l.(y)

On the other hand, if a purchaser by his conduct deter other persons from bidding, the sale will not be binding. Thus, where upon a sale by auction of a barge, a bidder addressed the company present, saying he had a claim against the late owner, by whom he said he had been ill used, whereupon no one offered to bid against him; but the auctioneer refusing to knock down the property to a single bidding, a friend of the bidder's bade a guinea more, and the first bidder then made a

(x) See Cowp. 397.

<sup>(</sup>y) See 6 Ves. jun. 629; Wren v. Kirton, 8 Ves. jun. 502; and see **Twining** v. Morris, 2 Bro. C. C. 326.

second and higher bidding, amounting, however, to only one fourth of the prime cost of the barge; it was held that there was no legal sale(z). (3).

III. The particulars and conditions of sale(a) next claim our attention.

It seems that the Judges will so construe them as to endeavor to collect the meaning of the parties, without

- (z) Fuller v. Abrahams, 3 Brod. & Bing. 116; S. C. 6 Moo. 316.
  - (a) See a form of them, App. No. 4.

(3) Where there was an agreement by the owner of an execution, with certain other persons, to prevent the usual competition at a sheriff's sale, in order to leave a balance on the execution, for the purpose of seizing other lands of the debtor, whereby the property was sold for a mere nominal price, it was held, that the sale was void. Troup v. Wood, 4 Johns. Ch. Rep. 228, 254. See *Brodie* v. Seagroves, 2 Hayw. 70.

So, where two persons, being desirous of purchasing certain articles advertised for sale at auction, agreed not to bid against each other, but that one of them should bid in the property, which should be divided between them, it was decided, that such agreement was without consideration and void, and against public policy. *Doolin v. Ward*, 6 Johns. Rep. 194. See *Wilbur v. How*, 8 Johns. Rep. 346. 2d edit. *Thompson v. Davies*, 13 Johns. Rep. 112. *Jones v. Caswell*, 3 Johns. Cas. 29.

So, a purchase, by an executor or administrator, of the estate of the testator or intestate, where others were deterred from bidding in consequence of doubts as to the title, suggested by the purchaser, whereby he obtained the property at an undervalue, will be annulled in equity. *Hudson* v. *Hudson*, 5 Munf. 180. See *Wood's Exr.* &c. v. *Hudson*, 5 Munf. 423.

And where the advertisement of a sale, contains an assertion which is false, as, that the land is to be sold for the satisfaction of three mortgages, when there are two only, by which purchasers may be deterred from bidding, the sale will be deemed irregular and void. Burnet v. Denniston, 5 Johns. Ch. Rep. 35.

encumbering themselves with the technical meaning of the words.

Thus where (b) the city of London let an estate by auction for a term of years, according to certain conditions of sale, by which it was stipulated that the purchaser should pay a certain rent before the lease was granted, which he accordingly agreed to do, the Court of King's Bench held that although the money to be paid could not be strictly called a rent, the relation of landlord and tenant not having then commenced, yet the parties intended the money should be paid, and it must be paid accordingly. Lord Kenyon said, he had always admired an expression of Lord Hardwicke's, "that there is no magic in words." But an agreement for purchase, with a stipulation, that until the conveyance is made the purchaser shall pay and allow to the seller at the rate of a fixed sum per annum, three half-yearly payments will create the relation of landlord and tenant, and the sum payable will be recoverable as rent(c).

Great care, however, should be taken to make the particulars and conditions accurate; for the auctioneer cannot contradict them at the time of sale, such verbal declarations being inadmissible as evidence(4).

Thus, where estates were put up to sale by auction(d), and in the printed particulars of sale were stated to be free from all incumbrances, they were bought by a person who, discovering that there was a charge on the estate of 17l. per annum, refused to complete the purchase, in con-

- (b) City of London v. Dias, Woodfall's L. & T. 301.
- (c) Saunders v. Musgrave, 6 Barn. & Cres. 524; S. C. 9 Dowl. & R. 529.
- (d) Gunnis v. Erhart, 1 H. Black. 289; see Jones v. Edney, 3 Camp. Ca. 285, 6; Bradshaw v. Bennett, 5 Carr. & Pay. 48.

<sup>(4)</sup> See Grantland v. Wight, 2 Munf. 179, contra, ut semb. Wright's Les. v. Dickline, 1 Peter's Rep. 199.

sequence of which, an action was brought by the vendor: and although he offered to give in evidence, that the auctioneer had publicly declared from his pulpit in the auction-room, where the estate was put up, that it was charged in the manner above specified, yet the court of C. B. refused to admit the evidence, as it would open a door to fraud and inconvenience, if an auctioneer were permitted to make verbal declarations in the auction-room, contrary to the printed conditions of sale; and the plaintiff was nonsuited. And this rule prevails in favor as well of the (\*) seller as of the purchaser(e), and it equally applies to a sub-sale; therefore, if A. buy at a sale after a formal explanation at the sale, which was heard by B., and then re-sell to B., the first declaration is no more binding upon B. than A., and therefore A. cannot enforce the contract, as explained by the auctioneer, against B.(f).

The same rule of course prevails in equity, where the person setting up the parol evidence is plaintiff. Upon the sale of an estate by auction the particular was equivocal as to the words: but it was clear the purchaser was to pay for timber and timber-like trees. There was a large underwood upon the estate. At the sale, the article being ambiguous, the auctioneer declared he was only to sell the land; and every thing growing upon the land must be paid for. The defendant, the purchaser, insisted he was only to pay for timber and timber-like trees, not for plantation and underwood. The declaration at the sale was distinctly proved; but it was determined by the Court of Exchequer that the parol evidence was not admissible (g)(5).

- (e) Powell v. Edmunds, 12 East, 6,
- (f) Shelton v. Livins, 2 Crompt. & Jer. 411.
- (g) Jenkinson v. Pepys, 6 Ves. jun. 330, cited; 15 Ves. jun. 521, stated.

<sup>(5)</sup> But, it seems, that a purchaser of an estate at auction, is bound VOL. I. 5 (\*32)

Nor when the seller is plaintiff can parol evidence be admitted on his behalf, of the declarations at the sale, although the purchaser by the written agreement bind himself to abide by the conditions and declarations made at the sale(h)(6).

But a question has been raised, whether, if by a collateral representation a party be induced to enter into a written agreement, different from such representation, he may not have an action on the case for the fraud practised to

lay asleep his prudence(i)(7).

- (\*) And if the purchaser have particular personal information given him of an incumbrance, or of the nature of the title, it seems that the parol evidence may be admitted(j). It may therefore be proved that the purchaser perused the original lease before the sale(k). Such evidence may be used in equity as a defence against the specific performance, if the parol variation was in favor of the defendant, and the plaintiff seek a performance in specie according to the written agreement(l)(8).
  - (h) Higginson v. Clowes, 15 Ves. jun. 515.
  - (i) See Powell v. Edmunds, 12 East, 6.
- (j) Gunnis v. Erhart, 1 H. Black. 289; and see Pember v. Mathers, 1 Bro. C. C. 52; Fife v. Clayton, 13 Ves. jun. 546, where the particular was altered before the sale. Ogilvie v. Foljambe, 3 Mer. 53.
  - (k) Bradshaw v. Bennett, 5 Carr. & Pay. 48.
  - (1) Higginson v. Clowes, ubi sup.

by the verbal declarations of the auctioneer, publicly made at the sale, and before the biddings commenced, not variant from the terms advertised, but merely additional and explanatory; and that the purchaser may be compelled to complete his purchase according to the terms so explained. Cannon v. Mitchell, 2 Des. 320. See Wainwright v. Read et al. 1 Des. 573.

- (6) See Contra. Grantland v. Wight, 2 Munf. 179.
- (7) See Bulkley v. Storer, 2 Day, 531. Monell v. Colden, 13 Johns. Rep. 395.
- (8) See Ten Broeck v. Livingston, 1 Johns. Ch. Rep. 357. Wain-wright v. Read et al. 1 Des. 573.

If it be the custom in a public auction-room to paste up the conditions of sale in the room, and the auctioneer announces that the conditions are as usual, they will, if pasted up according to the usual custom, be binding on the purchaser, although he did not see them(m). This can seldom, however, happen upon a sale of estates.

The late Mr. Bradley recommended, that where it is understood, at the time of sale, that the vendor has only a doubtful title, a provisional clause, to the following effect, should be inserted in the conditions of sale and articles of purchase; which would be sufficient, he thought, to obviate any doubt that might otherwise arise at the sale:

"That if the counsel of the purchaser shall, on the examination of the title, be of opinion that a good title and conveyance cannot be made of the purchased premises, within the time limited by the articles for carrying the same into execution; in that case, the same articles shall be discharged, and not further proceeded in on either side."

(\*) The estate cannot be too minutely described in the particulars; for although, as Lord Thurlow observed, it is impossible that all the little particulars relative to the quantity, the situation, &c. should be so specifically laid down, as not to call for some allowance and consideration, when the bargain comes to be executed(n); yet, if a person, however unconversant in the actual situation of his estate, will give a description, he must be bound by that, whether conusant of it or not(o)(9).

- (m) Mesnard v. Aldridge, 3 Esp. Ca. 271.
- (n) See 1 Ves. jun. 224, per Lord Thurlow.
- (o) See 1 Ves. jun. 213, per Lord Thurlow; Schneider v. Heath, 3 Camp. Ca. 506.

<sup>(9)</sup> See Judson v. Wass, 11 Johns. Rep. 525. M'Ferran v. Taylor, et. alt, 3 Cranch, 270. State v. Gaillard et. al. 2 Bay, 11.

Lord Ellenborough has observed, that a little more fairness on the part of auctioneers, in the forming of their particulars, would avoid many inconveniences. There is always either a suppression of the fair description of the premises, or there is something stated which does not belong to them; and in favor of justice, considering how little knowledge the parties have of the thing sold, much more particularity and fairness might be expected. The particulars, his Lordship added, are in truth like the description in a policy of insurance, and the buyer knows nothing but what the party communicates (p).

In one case (q) the conditions of sale stated a house to be "a free public-house." The lease contained a covenant to take beer from the lessors; the auctioneer read over the whole lease in the hearing of the bidders, but he stated erroneously that the covenant had been decided to be bad. The purchaser brought an action to recover his deposit. Lord Ellenborough said, that in the conditions of sale this is stated to be "a free public-house." Had the auctioneer afterwards verbally contradicted this. (\*)he should have paid very little attention to what he said from his pulpit. Men cannot tell what contracts they enter into if the written conditions of sale are to be controlled by the babble of the auction-room. But here the auctioneer, at the time of the sale, declared, that he warranted and sold this a free public-house. Under these circumstances, a bidder was not bound to attend to the clauses of the lease, or to consider their legal operation.

Where a lease is sold, the purchaser is not bound to complete his purchase if any part of the buildings demised have been removed, although he heard the lease

<sup>(</sup>p) See 3 Smith, 439; and see Duke of Norfolk v. Worthy, 1 Camp. Ca. 337, and post. Waring v. Hoggart, 1 Ry. & Mood. 39.

<sup>(</sup>q) Jones v. Edney, 3 Camp. Ca. 284.

read, and the particulars did not comprise the building in question(r).

But where the agreement was to sell the lease of a *public-house*, described as held at a certain net annual rent, under common and usual covenants, it was held that the contract was binding upon the purchaser, although the lease contained a covenant by the tenant to pay the land-tax, sewers rate and all other taxes, and a proviso for re-entry if any business but that of a victualler should be carried on in the house(s).

In a case where the original lease contained a power of re-entry if certain trades were carried on upon the property, and the lessee granted under-leases containing no such stipulation, and upon a sale by the assignee of the original lessee, the conditions of sale stated the covenant in the original lease, and that such covenant would be inserted in the under-leases to be granted to the purchasers, but no mention was made whether the covenant was inserted in the under-leases already granted, the purchaser was allowed to recover his deposit from the (\*)auctioneer(t). Lord Tenterden observed, that he was of opinion that it is the duty of every person truly and honestly to represent that which he is to sell. A careful man and a lawyer looking at these conditions of sale might ask what were the terms of the leases which had been granted: The purchaser is informed by the statement in the conditions, that the original lessee is restrained from carrying on these obnoxious trades, and that in the leases to be granted to him a similar covenant is to be entered into. None but a very careful person would suppose that it could be doubtful whether the

<sup>(</sup>r) Granger v. Worms, 4 Camp. Ca. 83.

<sup>(</sup>s) Bennett v. Womack, 7 Barn. & Cress. 627; S. C. 1 Man. & R. 644.

<sup>(</sup>t) Waring v. Hoggart, 1 Ry. & Mood. 39.

persons to whom under-leases had already been granted were bound in the same manner. He was, therefore, clearly of opinion that the plaintiff could not be bound to take the title.

In stating an estate to be of any given "clear" yearly rent, the parties should attend to the meaning of the word "clear," in an agreement between buyer and seller; which is clear of all outgoings, incumbrances, and extraordinary charges, not according to the custom of the country, as tythes, poor-rates, church-rates, &c. which are natural charges on the tenant(u).

As we have already seen, the statement that the property is in lease binds the purchaser to the covenants in the lease(v). In Barraud v. Archer(w) the particulars of sale described the estate, which was in the Isle of Ely, as consisting of fen land, and as being let to a tenant at the yearly rent of 165l., and stated that the lessor allowed the eau-brink-tax and land-tax. It appeared that the estate was also subject to other taxes for embanking and draining, under a local public act of (\*) Parliament, and as they were not mentioned in the particulars, the purchaser claimed a compensation for them. On the part of the seller, it was insisted that there was no misrepresentation, and that the particular expressly mentioned that the estate was fen land, and enumerated all the taxes which the landlord allowed to the tenant. and that it was not usual to state the taxes which the tenant paid. The Vice-Chancellor held that the purchaser was not entitled to a compensation(x).

But if there was a misrepresentation, of course the purchaser would be entitled to a compensation.

<sup>(</sup>u) Earl of Tyrconnel v. Duke of Ancaster, Ambl. 237; 2 Ves. 500.

<sup>(</sup>v) Supra, p. 9.

<sup>(</sup>w) 2 Sim. 433.

<sup>(</sup>x) Lord Townsend v. Granger, 2 Sim. 433.

<sup>(\*37)</sup> 

The mere exhibition of a plan of a new street, at the time of the sale of a piece of ground to build a house in the line of the intended street, does not amount to an implied contract to execute the improvements exhibited on the plan, where the written contract is silent on that head(y).

Where the timber and other trees are to be taken by the purchaser at a valuation, it should be stated accurately for what trees he is to pay.

In a case where there were several lots, it was stated after two of them, that the timber on them was to be paid for. The particulars were silent as to the timber on the other lots, which was of considerably greater value; but there was a general condition that all the timber and timber-like trees, down to 1s. per stick inclusive, should be taken at a fair valuation. The purchaser of the lots, to which no statement was annexed, claimed the timber without paying for it; and the Master of the Rolls thought that a purchaser might be so fairly impressed with that idea, notwithstanding the general condition, (\*)that he refused to compel him to perform the contract according to the seller's construction(z).

But although it should be merely stipulated that the purchaser shall pay for timber yet he must pay for trees not strictly timber, if considered so, according to the custom of the country(a).

It is proper, also, to make some provision as to articles not properly fixtures. Lord Hardwicke said, that if a man sells a house where there is a copper, or a brewhouse where there are utensils, unless there was some

<sup>(</sup>y) Feoffees of Heriott's Hospital v. Gibson, 2 Dow, 301; see Compton v. Richards, 1 Price, 27; Beaumont v. Dukes, 1 Jac. 422.

<sup>(</sup>z) Higginson v. Clowes, 15 Ves. jun. 516.

<sup>(</sup>a) Duke of Chandos v. Talbot, 2 P. Wms. 601; Anon. Ch. 25 July, 1808; Rabbett v. Raikes, Woodfall L. & T. 224, 6th ed; and see Aubrey v. Fisher, 10 East, 446.

consideration given for them, and a valuation set upon them, they would not pass(b). But in the absence of any stipulation, common fixtures would pass to the purchaser under the common conveyance(c)(10).

(b) Ex parte Quincey, 1 Atk. 478.

(c) Colegrave v. Dias Santos, 2 Barn. & Cress. 76; 3 Dowl. & R. 255.

(10) A kettle in a fulling mill, set in brick work, and used for dying cloth, will pass to the mortgagee in fee of the mill; though no mention of the appurtenances be made in the deed. Union Bank v. Emerson, 15 Mass. Rep. 159.

What ought to be considered a fixture depends, materially, upon the nature of the freehold sold. If a plantation, then all such things attached to the land, which are usually necessary, or used in the management of a farm would pass. If a freehold fitted up for a trade of any kind, or for manufactures, is sold to a person intending to follow the same business, then all the machinery necessary to the trade, or manufacture, so intended to be carried on, would pass. (By the Court in 1 Bailey's S. C. R. 541.) The action was trover for a cotton gin, which was attached to the gears in the gin-house; and it was held to be a fixture, which passed by the contract of sale. But in the earlier case of M'Clintock v. Graham, 3 M'Cord, 553, where the question was in respect to a still and vessels set up in a rock furnace, which was built against the wall. The claim of the purchaser was under a sheriff's sale; and the court were very clear, that it did not pass by the contract of sale. The Court, Colcock, J. observed-If it was a mere temporary thing not necessary to the enjoyment of the freehold; as between executor and heir, I should hold there was no doubt but that it must pass. But all difficulty in this case must vanish when we consider the question in relation to the parties claiming; as to them it becomes a mere question of contract. C. the first purchaser from T. says, when he bought the land, the still was excepted; and C., who sold to the defendant, says, he never heard a word about the still when he was buying, and did not consider himself as buying the still. Now, whatever rights may be acquired by those who succeed; if before they enter, the owner of the freehold himself makes a severance, there can be no room for doubt.

The case of vendor and vendee is different from that of landlord and tenant. Spencer, C. J. says in Holmes v. Tremper, 20 Johns. R. 29, "when a farm is sold without any reservation, the same rule would apply, as to the right of the vendor to remove fixtures, as exists between

When the title-deeds cannot be delivered up, some provision should be made as to the expense of the attested

the heir and executor." That rule is; whatever is affixed to the free-hold becomes part of it, and cannot be removed. The vendor has the absolute control, not only of the land, but of the improvements; and he has an election to sell or not to sell. If he does sell, he knows the fixtures pass; not being in such cases personal property. These principles were recognised in Miller v. Plumb, 6 Cowen, 665, where Plumb conveyed by deed without reservation, an ashery, in which the kettles were set in mason work, but the arches were upon a platform; and not fastened to the building. The troughs were sunk in the ground. Miller, who purchased the premises demised the ashery; and the lessee entered into possession and used the kettles until a fire consumed the building. The question being as to the fixtures, held, that the fixtures passed by the conveyance; but the plaintiff recovered in trover for some small articles not annexed to the freehold.

A tenant for life, years, or at will, may at the expiration of his estate remove from the freehold all such improvements as were erected or placed there by him, the removal of which will not injure the premises or put them in a worse plight than they were in when he took possession. Therefore, in Whiting v. Brastow, 4 Pick. 310, where the plaintiff sued the defendant in trespass for entering his close and carrying away a padlock and some boards put up in the corn house for binns: but neither were in any way fastened to the building. The defendant was but a tenant at will when the plaintiff purchased the estate. The Court held, that neither the padlock nor boards could be called a fixture. If put there by the landlord, they would not be fixtures; for they were loose and moveable without injury to the freehold. So, in Taylor v. Townsend, 8 Mass. 411, it was decided that a mortgagee, after a recovery by the mortgagor on a bill in equity to redeem; and until an execution of the decree of the court, may take down any buildings erected by him, the materials of which were his own; and which were not so connected with the soil as that they could not be removed without prejudice to it. It is enough for the tenant to say, "I leave you the land as I found it." A fortiori it ought to apply to a mortgagee who has held the estate for years under a conveyance from the owner.

In Gray v. Holdship, 17 S. & R. 413. it was held, that a copper kettle or boiler, which was fastened and fixed in the building, which was used as a brewery, and an essential part of it, was subject to the mechanic's lien law. Smith, J. distinguished this case from that in 14 Mass. R. 352, in which three carding machines in a wool carding

copies, and the covenants to produce them, which will otherwise fall upon the vendor(d); and where the estate is sold in many lots, and the title-deeds are numerous, nearly the whole purchase-money may, perhaps, be exhausted. In one case, the lots were more than 200, and the copies came to 2,000l.

If the estate is leasehold, and the vendor cannot procure an abstract of the lessor's title, this fact should be stated in the conditions (e).

(d) Dare v. Tucker, 6 Ves. jun. 460; and Berry v. Young, 2 Esp. Ca. 640, n. See post. c. 9.

(e) See post. ch. 7; and see Denew v. Deverell, 3 Camp. 451.

factory, were considered as personal property. There the carding machines were not a necessary part of the factory, and essential to its operations. They stood on the floor, and were not annexed to the building, except by a leather band, which passed over the wheel or pulley, to give motion to the machines. Here, the boiler was fastened and fixed in the building. He cited the case of the Union Bank v. Emerson, supra, and that from Mason's R. 459, in which Justice Story, decided, that the main mill-wheel and gearing of a factory attached to the same and necessary for its operations, are fixtures and real estate.

If one erect buildings upon the land of another voluntarily and without any contract, he may not remove them. Thus, in Washburn et al, v. Sproat, 16 Mass. 449, where the husband erected buildings on land, the fee of which was in the wife, held, that the buildings were not liable for his debts; his estate being insolvent after his decease. So, in Goddard v. Bolster et al. 6 Greenl. 427, where an agent of the owner of a mill put his own mill-stones and mill-irons into the mill, so as to become a part of the freehold, held, that neither the agent, nor his creditors could seize them, though the mill had been destroyed by a flood, and they alone remained.

It seems, however, that where the owner of land consents to the erection of a dwelling for the accommodation of a son, under an expectation, that the former would devise the land to the latter at some future time, the property of the building is personal property: and "perhaps the son, or persons claiming under him by purchase or execution, may enter and remove the buildings, without being subject to any other than nominal damages in an action of trespass." Wells et al. v. Banister & Trustee, 4 Mass. 514.

A purchaser of a leasehold estate must covenant with the vendor to indemnify him against the rent and (\*)covenants in the lease, although he is not expressly required to do so by the conditions of sale(f); and it will not vary the case that he is not entitled to any covenants for title; for example, where the sale is by an executor of an assignee(g); but assignees of a bankrupt selling a lease which was vested in him, cannot require the purchaser to enter into such a covenant for their indemnity or the indemnity of the bankrupt(h).

And although a purchaser is not required by the conditions of sale to give an indemnity against the rent and covenants, and an assignment is actually executed without any indemnity being given; yet, even a verbal agreement by the purchaser, before the sale, to secure such indemnity, will be carried into a specific execution, if it be distinctly proved(i).

Where a vendor is only an assignee of a leasehold estate, and is not bound by covenant to pay the rent, and perform the covenants in the lease, his liability to do so ceases upon his assigning the estate  $\operatorname{over}(j)$ , and consequently, in such case, there is not any thing for a purchaser to indemnify against. It has lately been decided that the assignee is liable to indemnify the lessee who assigned to him against breaches during the time he (the assignee) is in possession, although he has not covenanted to indemnify the lessee(k).

<sup>(</sup>f) See Pember v. Mathers, 1 Bro. C. C. 52; and see *post*. ch. 4, as to the obligation of a purchaser of an equity of redemption to indemnify the vendor against the mortgage-money.

<sup>(</sup>g) Staines v. Morris, 1 Ves. & Beam. 8.

<sup>(</sup>h) Wilkins v. Fry, 1 Mer. 244.

<sup>(</sup>i) Pember v. Mathers, 1 Bro. C. C. 52; and see post. ch. 3.

<sup>(</sup>j) See 1 Treat. Eq. 2d ed. p. 350, and Fonbl. n. (y) ibid.; and see Taylor v. Shum, 1 Bos. & Pull. 21.

<sup>(</sup>k) Burnett v. Lynch, 5 Barn. & Cress. 589; 8 Dowl. & R. 368.

It should always be stated in the conditions, that the (\*)conveyance shall be prepared by and at the expense of the purchaser(l).

The usual condition, "that if the purchaser shall fail to comply with the conditions, the deposit shall be forfeited, and the proprietors be at liberty to re-sell the estate; and the deficiency, if any, by such sale, together with all charges attending the same, shall be made good by the defaulter," should never be ommitted. It forms a lien on the estate for the purchase-money, &c. and if the purchaser do not comply with the conditions, the vendor may, by virtue of this stipulation, re-sell the estate, and recover the deficiency and charges from the purchaser (m)(11). And if the money produced by the second sale exceed the original purchase-money, the purchaser who has violated the agreement will not be entitled to the surplus, but the vendor himself will be entitled to retain it.

A stipulation in a contract, that in case the vendor cannot deduce a good title, or if the purchaser shall not pay the money on the appointed day, the agreement shall be void, does not enable either party to vitiate the agreement, by refusing to perform his part of it: the seller may avoid the contract, if the purchaser do not pay the money; the purchaser may avoid it, if the seller do not make a title; or the contract will be void, if the seller cannot make a title; but it is not sufficient for him to say that he cannot(n).

<sup>(1)</sup> See post. ch. 4.

<sup>(</sup>m) Ex parte Hunter, 6 Ves. jun. 94; and See Moss v. Matthews, 3 Ves. jun. 279; Mertens v. Adcock, 4 Esp. Cas. 251; sed vide 7 Ves. jun. 275. See Greaves v. Ashlin, 3 Camp. 466.

<sup>(</sup>n) Roberts v. Wyatt, 2 Tau. 268.

<sup>(11)</sup> But the vendor cannot maintain an action against the vendee, for a breach of the contract of sale, until, on a re-sale, the deficit shall have been ascertained. Webster and Ford v. Hoban, 7 Cranch, 399. (\*40)

If the purchaser, after breaking the condition, become bankrupt, and the estate is re-sold at a loss, the expenses (\*)of the sale, &c. being in the nature of unliquidated damages, cannot pe proved under the commission; but as the vendor has a lien on the estate, he may apply the money produced by the last sale of the estate, first, in payment of those articles which it is just he should receive, but which he could not prove under the bankruptcy; then towards payment of the original purchasemoney; and the balance may be proved under the commission(o).

In a recent case (p), a leasehold house and furniture had been sold for 4,370l. and the assignment was executed, but neither it nor the lease, nor possession, had been delivered; and the purchaser declining to complete the contract, the sellers brought an action and recovered the whole amount of the purchase-money and costs. The purchaser became a bankrupt, and the assignees took possession of the house. The seller then sold the house and furniture at a considerable loss: and Lord Eldon considered that they were entitled to a lien for the amount of the sale and costs, and to a proof for the difference, although it was insisted that they were concluded by their action.

If a house be sold, with all the lights belonging to it, and it is intended to build upon the adjoining ground belonging to the same owner, so as to interfere with the lights, a right so to build should be expressly reserved: it will not do to describe the house as abutting on building ground belonging to the seller(q).

<sup>(</sup>o) Ex parte Hunter, 6 Ves. jun. 94; Bowles v. Rogers, ibid. 95, n.; 1 Cooke, 123.

<sup>(</sup>p) Ex parte Lord Seaforth, 1 Rose, 306; ex parte Gyde, 1 Glyn & Jam. 323.

<sup>(</sup>q) Swanborough v. Coventry, 9 Bing. 305; S. C. 2 Moo. & S. 362.

The condition which has now become almost universal, that any mistake in the description of the estate, &c. (\*)shall not annul the sale, will only guard against unintentional errors.

This was decided by Lord Ellenborough in a case where the estate was stated in the particulars to be about one mile from Horsham. It turned out that the estate was between three and four miles from that place. Upon an action brought by the purchaser for recovery of the deposit, it was insisted that the effect of the misdescription was saved by the condition, which provided that no error or mis-statement should vitiate the sale. But Lord Ellenborough said, that in cases of this sort he should always require an ample and substantial performance of the particulars of sale unless they were specifically qualified. Here there was a clause inserted, providing that an error in the description of the premises should not vitiate the sale, but an allowance should be made for it. This he conceived was meant to guard against unintentional errors, not to compel the purchaser to complete the contract if he had been designedly misled. His Lordship therefore left it to the jury, whether this was merely an erroneous statement, or the misdescription was wilfully introduced, to make the land appear more valuable from being in the neighborhood of a borough town. In the former case, the contract remained in force, but in the latter case the plaintiff was to be relieved from it, and was entitled to recover back his deposit. The plaintiff had a verdict; so that the jury must have thought the misdescription fraudulent(r)(12).

(r) Duke of Norfolk v. Worthy, 1 Camp. Ca. 337; see Fenton v. Brown, 14 Ves. jun. 144; 1 Ves. and Bea. 377; Stewart v. Alliston, 1 Mer. 26; Trower v. Newcome, 3 Mer. 704.

<sup>(12)</sup> See M'Ferran v. Taylor et alt. 3 Cranch, 270.

<sup>(\*42)</sup> 

So in the case of Powell v. Doubble(s). A house was described, in the particulars of sale, as a brick-built dwelling-house. It turned out that the house was built (\*)partly of brick and partly of timber, and that some parts of the exterior were only composed of lath and plaster, and that there was no party-wall to the house. Shortly after the sale, the ancient chimnies fell inwards through the house, but it was not proved to what this was to be attributed. The case was heard upon bill and answer. There was the usual condition about misdescriptions being the subject of allowance. The bill was dismissed with costs, as the Vice-Chancellor was of opinion that such a description means that the house was brick-built in the ordinary sense, and that it was not a subject for compensation.

And although the condition as usual provides for payment of a compensation, yet the sale will be void if from the nature of the case no estimate can be made of the diminution in value. Thus, where a reversion was sold after the death of a person aged sixty-six, in case he should not have children, it turned out that he was only sixty-four, and Lord Tenterden held, that the sale was void. He said that in the case of a reversion simply expectant on the death of an individual, if a mistake be made in his age, a compensation may be made under the condition, for the difference of value may be computed; but where there is an additional contingency, such as that of the birth of future children, in this case the difference of age alters the likelihood of that contingency, and in such a case therefore no estimate can possibly be made of the difference of value between the thing described and the thing sold, and the contract itself must be vacated(t).

<sup>(</sup>s) MS. V. C. 15 June 1832.

<sup>(</sup>t) Sherwood v. Robins, 1 Mood. & Malk. 194; S. C. 3 Carr. & P. 339.

A bidding at a sale by auction may be countermanded at any time before the lot is actually knocked down(u)(13); (\*)because the assent of both parties is necessary to make the contract binding; that is signified, on the part of the seller, by knocking down the hammer. An auction is not unaptly called locus panitentia. Every bidding is nothing more than an offer on one side, which is not binding on either side till it is assented to. If a bidding was binding on the bidder before the hammer is down, he would be bound by his offer, and the vendor would not, which can never be allowed.

The countermand of a bidding would, in some cases, prove of the most serious consequences; and it might therefore be advisable to stipulate in the conditions of sale, that no person shall retract their biddings.

Although the duty is, by the acts, imposed on the vendor, yet he is not restrained from making it a condition of sale, that the duty, or any certain portion thereof, shall be paid by the purchaser over and above the price bidden at the sale by auction: and in such case the auctioneer is required to demand payment of the duty from the purchaser, or such portion thereof as is payable by him under the condition: and, upon neglect or refusal to pay the same, such bidding is declared by the act to be null and void to all intents and purposes(v)(I).

(\*44)

<sup>(</sup>u) Payne v. Cave, 3 Term Rep. 148; see Routledge v. Grant, 4 Bing. 653; S. C. 1 Moo. & P. 717. As to goods, see Phillips v. Bistolli, 3 Dowl. & Ry. 822.

<sup>(</sup>v) 17 Geo. III. c. 50. s. 8. See 7 Ves. jun. 345.

<sup>(</sup>I) This provision seems very objectionable. It might be contended, that if a purchaser disliked his bargain, his refusal to pay the auction duty would annul the sale, and throw the whole expense attending it on the vendor, whose estate would still remain unsold. If there be any foundation for this argument, the clause in question should not be permitted to stand in its present shape.

<sup>(13)</sup> See Downing v. Brown et alt. Hardin, 181.

It is usual to make some provision respecting the payment of the auction duty, as that the vendor and purchaser shall pay it in equal moieties; and indeed, where the purchase-money is liable to the duty, a stipulation of this nature should never be omitted, unless the vendor (\*)intend to pay the whole duty himself. If the seller cannot make a title, the purchaser can recover from him the auction duty which he has paid(w). And if the sale be not binding, the auctioneer, although he has paid the duty, cannot, under the common condition, recover it from the purchaser, as he is called, because, although the highest bidder, he is not the purchaser(x).

The other provisions which ought to be inserted in conditions of sale, are so well known as not to require notice.

IV. It frequently happens that estates advertised to be sold by auction, are sold by private contract, instead of being brought to the hammer, and the sale is not announced to the public till the day fixed for the auction, and even sometimes not till the auctioneer's appearance in the auction-room. Notice of an intended sale by auction is said to be a contract with all the world: and the parties to whom the notice is addressed ought not to be put to the expense and trouble of attending the auction unless the sale is to take place. It should be stated, therefore, in the advertisements, that the estate will be sold by auction at the place and time fixed upon, unless previously sold by private contract; in which case notice of the sale shall be immediately given to the public: and notice should be given accordingly.

If an auctioneer sell an estate without a sufficient authority, so that the purchaser cannot obtain the benefit of his bargain, he (the auctioneer) will be compelled to pay

<sup>(</sup>w) Cane v. Baldwin, 1 Stark. 65.

<sup>(</sup>x) Jones v. Nanney, 13 Pri. 76; S. C. M'Clel. 25.

all the costs which the purchaser may have been put to, and the interest of the purchase-money, if it has been

unproductive(y)(13).

(\*) If an attorney or agent bid more for an estate than he was empowered to do, he himself would be liable; but it seems that his principal would not(z). But unless he were expressly limited as to price, and not enabled to go beyond the limits of his authority, his principal would be bound(a)(14).

Where the principal denies the authority, and the agent is compelled to perform the agreement himself, because he cannot prove the commission, he may afterwards file a bill against his principal; and if the principal deny the authority, an issue will be directed to try the fact; and if the authority be proved, the principal will be compelled to take the estate at the sum which he authorized the agent to  $\operatorname{bid}(b)$ . If the agent make the agreement in that character, and his authority is denied, and he pays the deposit, he may recover it back in his own name if a good title cannot be  $\operatorname{made}(c)$ . If the agency be estab-

<sup>(</sup>y) Bratt v. Ellis, MS.; Jones v. Dyke, MS. App. Nos. 7 and 8; and see Nelson v. Aldridge, 2 Stark. 435; Jaby v. Driver, 2 Yo. & Jer. 549.

<sup>(</sup>z) See Ambl. 498; 10 Ves. jun. 400.

<sup>(</sup>a) Hicks v. Hankin, 4 Esp. Ca. 114. See East India Companyv. Hensley, 1 Esp. Ca. 112.

<sup>(</sup>b) Wyatt v. Allen, MS. App. No. 9.

<sup>(</sup>c) Langstroth v. Toulmin, 3 Stark. 145.

<sup>(13)</sup> See Dusenbury v. Ellis, 3 Johns. Cas. 70.

<sup>(14)</sup> See Batty v. Carswell et alt. 2 Johns. Rep. 48. Lee v. Munroe et alt. 7 Cranch, 366.

The principal is liable for the acts of a general agent, acting within the general scope of his authority; and a third person cannot be affected by private instructions from the principal to his agent; but when a special agent acts without authority, the principal is not bound. Munn v. Commission Co. 15 Johns. Rep. 44.

lished, the agent will be compelled to transfer the benefit of the contract to his principal, although he made the contract in his own name, and swears that it was on his own account(d).

If an auctioneer give credit to the vendee, or take a bill, or other security, for the purchase-money, it is entirely at his own risk: the vendor can compel him to pay the money(e)(15). As between an agent for the seller

- (d) Lees v. Nuttall, 1 Russ. & My. 53.
- (e) Williams v. Millington, 1 H. Blackst. 81. See Wiltshire v. Sims, 1 Camp. N. P. 258.
- (15) So, if an auctioneer depart from his instructions, he is liable to his employer for all the damage sustained thereby; as where the defendant, who was an auctioneer, was directed to sell certain goods at auction, on a credit, taking security from the purchasers for the amount of their purchases; the goods, were sold, and lands with security, were taken for a part, and the rest were delivered to the purchasers without security; on closing the account of sales with the plaintiffs, the defendant paid a part of the amount in cash, and offered the bonds and open accounts of the purchasers for the residue, which were refused; it was held, that the defendant was liable for the amount both of the bonds and open accounts. Wilkinson v. Campbell, 1 Bay, 169.

Where a factor has been instructed to sell goods for cash, and he permits the purchaser to take them away without payment at the time of sale, he is liable, though a usage among factors is proved of allowing to purchasers a week or fortnight to make payment, where the sale has been for cash. Barksdale v. Brown, 1 Nott & Mc Cord, 517. See Van Allen v. Vanderpool, 6 Johns. Rep. 69. Goodenow v. Tyler, 7 Mas. Rep. 36, 42. James v. M'Credie, 1 Bay, 294.

An auctioneer selling a house for a sum less than the price limited by his instructions, and crediting the vendor the full price, is bound by it, though the price obtained was the full value of the property sold. Higginson v. Fabre's Exrs. 3 Des. 90.

In Steele et al v. Ellmaker, 11 S. & R. 86, where goods were sent to auctioneers "to be disposed of by them at the average price of 50 per cent advance on the sterling cost, as quoted in the invoice, but not otherwise;" but the defendants sold them for less: held, that the plaintiffs were entitled to recover the difference. Tilghman, C. J. after a commentary upon the English cases, concluded thus: "It is agreed

and a purchaser, it seems that an agent with an undisclosed principal may vary the terms of payment after the sale is completed, the principal may interfere at any time before payment, but not to rescind what has been before done. (\*) This is essential to the safety of purchasers. But if a man sell, acting as a broker, the moment the sale is completed he is functus officii. The terms of the contract cannot then be altered except by the authority of the principal (f)(16).

If a purchaser pay his money to the agent of the vendor before the time when the latter is authorized to receive it, he makes that agent his own for the purpose of paying over the money to the right owner(g).

If the seller for a valuable consideration direct his agent to pay over the proceeds of the sale to a third person, he cannot revoke the order(h).

The auctioneer should not part with the deposit until the sale be carried into effect(i); because he is considered

- (f) See Blackburn v. Scholes, 2 Camp. 343.
- (g) See Parnther v. Gaitskill, 13 East, 432.
- (h) Metcalf v. Clough, 2 Mann. & Ryl. 178.
- (i) Burrough v. Skinner, 5 Burr. 2639; Berry v. Young, 2 Esp. Ca. 640, n.; Spurrier v. Elderton, 5 Esp. Ca. 1; and see post. ch. 10.

on all hands, (even by Lord Mansfield) that it is fair to limit the price, provided it be made known. The defendant then, being under no injunction of secrecy, might have complied with the plaintiff's orders, without violating the most fastidious rules of morality. Or, if he thought there would be some difficulty in doing this, (the order being not to sell under a certain average) he might have said so, and then the plaintiff must have been more explicit in his directions. But without making any objection, or intimating any difficulty, the defendant accepted the commission, and then sold the goods, contrary to his instructions. I confess, I cannot see, how he can be justified, or what should prevent the plaintiff's recovery, as there is no suggestion of any thing unfair, in his conduct, or intentions.

(\*47)

<sup>(16)</sup> See Kelley v. Munson, 7 Mass. Rep. 319.

as a stakeholder, or depositary of it(j). In a late case, where the auctioneer was also the attorney of the seller, and paid over the money to the seller, after he knew that objections to the title had been raised, an action against him for the deposit was sustained, but the Judges cautiously abstained from pointing out the duty of an auctioneer in any other case(k). However, in a later case, where the auctioneer had paid over the deposit to the vendor, without any notice from the purchaser not to do so, and before any defect of title was discovered, it was held that the purchaser (the title being defective) might recover the deposit from the auctioneer(l).

If both the parties claim the deposit, the auctioneer may file a bill of interpleader, and pray for an injunction, (\*)which will be granted, upon payment into court of the deposit(m).

But an auctioneer cannot maintain a bill of interpleader if he insist upon retaining out of the deposit either his commission or the auction duty; for interpleader is where the plaintiff is the holder of a stake which is equally contested by the defendants, as to which the plaintiff is wholly indifferent between the parties, and the right to which will be fully settled by interpleader between the defendants(n).

If upon a bill filed for an injunction, the Court order the deposit to be paid into court, it will, it seems, be after deducting the auctioneer's charges and expenses(o), although perhaps this deserves re-consideration; for the purchaser's deposit may not ultimately be the fund out of

<sup>(</sup>j) Jones v. Edney, cor. Lord Ellenborough, 4 Dec. 1812.

<sup>(</sup>k) See Edwards v. Hodding, 5 Taunt. 815; 1 Marsh. 377.

<sup>(1)</sup> Gray v. Gutteridge, 1 Mann. & Ryl. 614.

<sup>(</sup>m) Farebrother v. Prattent, 5 Price, 303; 1 Dan. 64.

<sup>(</sup>n) Mitchell v. Hayne, 2 Sim. & Stu. 63; but as to the auction duty, see Farebrother v. Prattent.

<sup>(</sup>o) Annesley v. Muggridge, 1 Madd. 593.

which those charges are to be paid; but this is done without prejudice to any question as to so much of the deposit as is retained (p).

In a case where 1,000l, was paid as a deposit to an auctioneer, according to the conditions of sale, and the vendor opposed two motions by the purchaser, in an original and cross-cause filed concerning the contract, for payment of the deposit into court, and the auctioneer became a bankrupt, the loss was holden to fall on the vendor, although the second motion had succeeded, and the day named for payment of the money into court was subsequent to the bankruptcy(q). And perhaps a loss by the insolvency of the auctioneer will, in every case, fall on the vendor, who nominates him, and whose agent he properly is(r).

(\*)And unless an auctioneer disclose the name of his principal, an action will lie against him for damages on

breach of contract(s).

Generally speaking, an auctioneer is not liable for interest; but that subject will be considered fully in the chapter on Interest(t).

If an auctioneer do not insert usual clauses in the conditions of sale, whereby the sale of the estate is defeated, he cannot recover any compensation from the vendor for his services: and it is immaterial that he read over the conditions of sale to the seller, who approved of them. The same rule of course applies to negligence generally on the part of the auctioneer, whereby the sale is defeated (u).

(p) Yates v. Farebrother, 4 Madd. 239.

(q) Brown v. Fenton, et e cont. Rolls, 23 June, 1807, MS.; S. C. 14 Ves. jun. 144.

(r) See 2 H. Blackst. 592; 13 Ves. jun. 602; 14 Ves. jun. 150; Annesley v. Muggridge, 1 Madd. 593; Smith v. Lloyd, 1 Madd. 618.

- (s) Hanson v. Roberdeau, Peake's Ca. 120; see Simon v. Motivos, 3 Burr. 1921; Owen v. Gooch, 2 Esp. Ca. 567; 12 Ves. jun. 352, 484.
  - (t) Post. ch. 10. s. 1.
  - (u) Denew v. Deverall, 3 Campb. 451.

(\*49)

Where a man is completely the agent of the vendor, a payment to him is in law a payment to the principal; and in an action against the latter for recovery of the deposit, it is immaterial whether it has actually been paid over to him or not(v)(17).

An auctioneer being only an agent, may safely pay over the proceeds of the sale to the seller, his principal, although the latter is to his knowledge in insolvent circumstances (w).

It may here be remarked, that a deposit is considered as a payment in part of the purchase-money(x), and not as a mere pledge; which was also the rule of the civil law, where money was given; but if a ring, &c. was (\*)given by way of earnest, or pledge, it was to be returned(y).

If, pending a suit for specific performance, a deposit be laid out in the public funds, under the authority of the Court, it will be binding on both vendor and vendee; and, if laid out without opposition by the seller, it must be presumed to be with his assent; and, in either case, he must take the stock as he finds  $\mathrm{it}(z)$ .

If a purchaser is entitled to a return of his deposit, he is not compellable to take the stock in which it may have been invested, unless such investment were made under the authority of the Court, or with his assent. And an assent will not be implied against a party because notice

- (v) Duke of Norfolk v. Worthy, 1 Camp. N. P. 337.
- (w) White v. Bartlett, 9 Bing. 378; S. C. 2 Moo. & S. 515.
- (x) Pordage v. Cole, 1 Saund. 319; see Main v. Melbourn, 4 Ves. jun. 720; Klinitz v. Surry, 5 Esp. Ca. 267; Ambrose v. Ambrose, 1 Cox. 194.
  - (y) Vinnius, l. 3. 24.
- (z) Poole v. Rudd, 3 Bro. C. C. 49; and see Doyley v. the Countess of Powis, 2 Bro. C. C. 32; 1 Cox, 206.

<sup>(17)</sup> See Taber v. Perrot et al. 2 Gallis. 565.

was given to him of the investment, to which he made no reply(a). Therefore, where the deposit is considerable, and it is probable that the purchase may not be completed for a long time, it seems advisable for the parties to enter into some arrangement for the investment of the deposit.

As a vendor will not be subject to any loss by the investment of the purchase-money in the funds without his assent, so he will not be entitled to any benefit by a rise in the funds, although the purchaser gave him notice of the investment; unless he (the vendor) agreed to be bound by the appropriation. Sir William Grant has observed, that a deposit does not impose a liability or responsibility upon the party to whom notice of it is given; throwing upon him any risk as to the principal. The principal remains entirely at the risk of the party making the deposit. He cannot, by depositing the money with his bankers, throw the risk of their credit upon the (\*)other parties. They are not called upon to express their opinion of that bank, or to say any thing upon the subject. There is no difference between that and a deposit at the Bank of England, or a conversion of the money into stock; as the one party has no more right to make the other consent to have the fund laid out in stock than in a private bank(b).

No objection can be made to the whole of the deposit required by the conditions not being paid by the purchaser, if the vendor, after the sale, agree to accept a less sum(c).

Although the deposit be forfeited at law, yet equity will, in general, relieve the purchaser, upon his putting the

<sup>(</sup>a) Roberts v. Massey, 13 Ves. jun. 561.

<sup>(</sup>b) Roberts v. Massey, ubi sup; Acland v. Gainsford, 2 Mad. 28.

<sup>(</sup>c) Hansen v. Roberdeau, Peake's Ca. 120. See ex parte Gwynne, 12 Ves. jun. 378; and 1 Campb. Ca. 427.

<sup>(\*51)</sup> 

vendor in the same situation as he would have been in had the contract been performed at the time agreed upon(d). But if a bill by a purchaser for a specific performance is dismissed, the Court cannot order the deposit to be returned: as that would be decreeing relief(e).

Where the seller files the bill he submits to the jurisdiction, and although his bill is dismissed, the Court will compel him to repay the deposit, and with interest, where that ought to be paid. This was first decided by Lord Eldon, and has since been followed by other judges.

It is well settled, that assignees of a bankrupt are not bound to take what Lord Kenyon calls a damnosa hæreditas, property of the bankrupt, which so far from being valuable, would be a charge to the creditors; but they may make their election; if, however, they do elect to take (\*) the property, they cannot afterwards renounce it, because it turns out to be a bad bargain(f). This observation is made as an introduction to a case(g), in which it was decided that the assignees of a bankrupt could not be charged as assignees of the lease, where they had not entered into actual possession, but merely put up the property to sale by auction without stating to whom it belonged, or on whose behalf it was sold, and no person bid at the sale: the Court considered this as a mere experiment to enable .the assignees to judge, whether the lease were beneficial or not, and compared it to a valuation by a surveyor. If the assignees do accept the property, the bankrupt is by a late

<sup>(</sup>d) Vernon v. Stephens, 2 P. Wms. 66; Moss v. Matthews, 3 Ves. jun. 279.

<sup>(</sup>e) Bennet College v. Carey, 3 Bro. C. C. 390.

<sup>(</sup>f) See 7 East, 342.

<sup>(</sup>g) Turner v. Richardson, 7 East, 336; Wheeler v. Bramah, 3 Campb. 370; Copeland v. Stephens, 1 Barn. & Ald. 593; and see Carter v. Warne, 1 Mood. & Malk. 479; S. C. 4 Carr. & P. 191.

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act(h) relieved from the rent and covenants, and if the assignees decline the same, the bankrupt is not to be liable in case he deliver up the lease to the lessor within fourteen days, and the lessor is enabled in a summary way to compel the assignees to make their election either to accept the same or deliver up the lease and possession of the estate.

Immediately after sale of an estate by auction, an agreement(i) to complete the purchase should be signed by the parties or their agent, because sales by auction of estates are within the statute of frauds(j); and consequently, the contract could not be enforced against either of the parties who had not signed an agreement(18). Although a man purchase several lots, yet a distinct contract arises upon each lot, and consequently, if no lot is of the value of 20l., no stamp is necessary, although altogether they are of more (\*)value(k); but they may all be comprised in one agreement.

The above observation, in regard to the necessity of a written agreement, of course, applies to sales by private contract(l); as indeed do all the foregoing observations, which are not in their nature applicable exclusively to sales by auction.

- (h) 6 Geo. IV. c. 16, s. 75. See ex parte Pomeroy, 1 Rose, 57; ex parte Nixon, 1 Rose, 445.
  - (i) See a form of an agreement, Appendix, No. 5.
  - (j) See post. ch. 3.
  - (k) Emmerson v. Heelis, 2 Taunt. 38.
  - (1) See post. ch. 3. See a form of an agreement, Appendix, No. 6.

<sup>(18)</sup> It has been decided, that an auctioneer is the authorized agent of the purchaser of land, at auction, to sign the contract of sale for him, as the highest bidder; and that writing his name, as the purchaser, in the memorandum of the sale, by the auctioneer, immediately on receiving his bid and knocking down the hammer, is a sufficient signing of the contract within the statute of frauds.  $\mathcal{M}Comb$  v. Wright, 4 Johns. Ch. Rep. 659. See Davis v. Robertson, 1 Rep. Con. Ct. 71. Cleaves v. Foss, 4 Greenl. 1.

As agreements for sale of estates are generally entered into by the attornies of the parties, it may, in this place, be proper to observe, that where an attorney enters into an agreement on behalf of his principal, the agreement should be made and signed in the name of the principal, by him as attorney: for if an attorney covenant in his own name for himself, his heirs, &c. he will himself be personally bound, though he be described in the instrument as covenanting for and on the part of his principal(m)(19).

Where an estate is sold in lots, whether by public auction or private contract, it may be advisable for the vendor to take attested copies of the parcels included in the different conveyances; in order to satisfy a cautious purchaser of any part of the estate, that no part of the estate bought by him is included in any of the conveyances to the other purchasers.

It may here be observed, that if a man agree to get another so much for his estate, and actually provide a purchaser with whom the owner agrees for the sale of the property, at the sum stipulated, and a deposit is paid, the first agreement will be performed, although the purchaser (\*)cannot perform the agreement, if the seller let him off, and retain the deposit as a forfeiture.(n)

If an agent for sale of an estate is to be paid a per-

<sup>(</sup>m) Appleton v. Binks, 5 East, 148; Kendray v. Hodson, 5 Esp. Ca. 228; Norton v. Herron, 1 Ry. & Mood. 229; S. C. 1 Carr. & P. 648; Spittle v. Lavender, 1 Moore, 270; Grey v. Gutteridge, 1 Man. & Ry. 614. See Duke of Norfolk v. Worthy, 1 Camp. N. P. 337; Brown v. Morris, 2 Taunt. 375.

<sup>(</sup>n) Horford v. Wilson, 1 Taunt. 12.

<sup>(19)</sup> See Duval v. Craig et al. 2 Wheat. 45, 56. Tippets v. Walker, 4 Mass. Rep. 595. Thatcher v. Dinsmore, 5 Mass. Rep. 299. Forster v. Fuller, 6 Mass. Rep. 58. Sumner v. Williams, 8 Mass. Rep. 162. Thayer v. Wendall, 1 Gallis. 37. White v. Skinner, 13 Johns. Rep. 307.

centage on the sum obtained, he cannot recover his commission until the money is received by the principal. If therefore it is paid into the bank under an act of Parliament, by the authority of which the property was purchased, the commission is not recoverable until at least the seller's right to the money is ascertained, and it is owing to his wilful default that he has not received it(o).

Where a man had bought an estate and paid a deposit, but the title had not been made out, and being desirous of compromising with his creditors, applied to the seller to cancel the contract and return the deposit, which he refused to do, but said that he would never sue the purchaser on the contract, and thereupon the compromise with the creditors proceeded; it was held that it would have been a fraud in the seller if he had attempted to enforce the contract, and therefore the purchaser was not allowed to recover the deposit, although the title had not been made out (p)(20).

V. By a late act(q), the following duties are imposed upon every valuation or appraisement of any estate, or effects, real or personal, or of any interest therein, or of the annual value thereof; viz. where the amount does not exceed 50l., a duty of 2s. 6d.; where it exceeds 50l. but does not exceed 100l., a duty of 5s.; where it exceeds 100l. and does not exceed 200l., a duty of 10s.; where it exceeds 200l. and does not exceed 500l., a duty of 15s.; and where it exceeds 500l., a duty of 20s.

<sup>(</sup>o) Bull r. Price, 7 Bing. 237; 5 Moo. & P. 2.

<sup>(</sup>p) Clark v. Upton, 3 Mann. & Ryl. 89.

<sup>(</sup>q) 55 Geo. III. c. 148. See Lees v. Burrows, 12 East, 1.

<sup>(20)</sup> See Treatise on Principal and Agent, (1836) tit. Auctioneers, where all the American cases are abridged.

## (\*)CHAPTER II.

OF SALES UNDER THE AUTHORITY OF THE COURTS OF EQUITY.

#### SECTION I.

Of the Proceedings from the Advertisements to the Conveyance.

We have already seen, that sales under the decrees of the Court of Chancery, or Exchequer, are not liable to the auction duty; and therefore if public notice of a vendor's intention to bid for the estate is not necessary, where a single bidder is employed to prevent the estate from being sold at an under-value(z), it follows, that no notice need be given previously to the sale of an estate under a decree, of the vendor's intention to buy in the estate, if a particular price be not bid for it. At the same time, it must be observed, that where a fraud is committed on the purchaser, by puffing at the sale, it cannot be supported, any more than a sale by auction under similar circumstances(a); but the Court will, in a proper case, authorize a bidding to be reserved, and to be made one of the conditions of sale(b).

Where an estate is directed to be sold before a Master, the particulars of sale are prepared by the plaintiff's solicitor: after they are allowed by the Master, the advertisement for sale must be prepared, either by the plaintiff's solicitor, or by the Master's clerk, and the signature of

<sup>(</sup>z) Vide Supra, p. 13.

<sup>(</sup>a) Vide supra, p. 24.

<sup>(</sup>b) Jervoise v. Clark, 1 Jac. & Walk. 389.

(\*)the Master must be obtained to authorize the insertion of the advertisements in the Gazette. There are always two advertisements (c); in the first, no time is appointed for the sale. About three weeks or a month after the insertion of the first advertisement, a warrant must be taken out to fix a time for the sale, and it must be served on all the parties' clerks in court. The warrant being attended, the Master, with the approbation of all parties, will fix the time; and the second advertisement, which is usually called the peremptory advertisement, stating the time, must then be prepared, and inserted in the Gazette(d). The estate may be sold either before the Master; or, if from the situation and nature of the estate, the sale ought not to take place in town, it may be sold in the country before the Master's clerk, or any other person authorized by the Master(e).

The plaintiff's solicitor should attend at the sale, which is conducted in the following manner: The Master's clerk prepares a particular of the lots to be sold, with spaces between each lot. The lots are successively put up at a price offered by any person present, and every bidder must sign his name and the sum he offers, in the space on the particular, under the lot for which he bids; and formerly 2s. 6d. was paid to the Master's clerk for every bidding; but that regulation, which had a tendency to damp the sale, has lately been very properly abolished, and in lieu of the half-crowns, a sum is allowed to the clerk, as part of the expenses attending the sale.(1) The best bidder is of course declared the purchaser. If any

<sup>(</sup>c) 2 Fowl. Prac. 305.

<sup>(</sup>d) See 1 Turner's Practice by Ven. 127.

<sup>(</sup>e) See 2 Fowl. Prac. 305.

<sup>(</sup>I) This will of course be now corrected under the authority of the late act 3 & 4 W. 4, c. 94.

<sup>(\*56)</sup> 

(\*)lots are not sold, they must be again advertised for sale (f).

The payment of a deposit, and the investment of it in the funds, are governed by the same rules as are adhered to where the contract is between party and party(g).

The Court will, on motion, discharge the purchaser, and substitute any other derson in his stead; but this will not be done unless such person pay in the money, and an affidavit be made that there is no under-bargain; for the new purchaser may give the other a sum of money to stand in his place, and so deceive the  $\operatorname{Court}(h)$ . Formerly the practice seems to have been to require the consent of all the parties in the cause, as well as the consent of the original purchaser(i).

If the purchaser resell at a profit behind the back of the Court, before his purchase is confirmed, the second purchaser is considered a substituted purchaser, and must pay the additional price into Court for the benefit of the estate(j).

Although more of an estate is sold than is necessary for the purposes of the trust by virtue of which the decree was made, yet the purchaser can make no objection to it, the decree being a sufficient security to him, as it cannot appear but that it was right to sell the whole. If, however, the decree were, that the Master should sell Greenacre, and he sells Blackacre, an objection to the sale would be good(k); although it seems that it may be laid down as a general rule, that a purchaser shall not (\*)lose the benefit of his purchase by any irregularity of

<sup>(</sup>f) See 1 Turn. Prac. 129; 2 Fowl. Prac. 306, 307.

<sup>(</sup>g) Vide supra, p. 50; Ambrose v. Ambrose, 1 Cox, 194.

<sup>(</sup>h) Rigby v. M'Namara, 6 Ves. jun. 515; Vale v. Davenport, 6 Ves. jun. 615.

<sup>(</sup>i) Matthews v. Stubbs, 2 Bro. C. C. 291.

<sup>(</sup>j) Nodder v. Ruffin, 1 Taunt. 341.

<sup>(</sup>k) Lutwych v. Winford, 2 Bro. C. C. 248.

the proceedings in a cause (1). If a decree is obtained by fraud, it may, of course, be relieved against (m); and it has been said that a purchaser is bound to see, that, at least as far as appears on the face of the proceedings before the Court, there is no fraud in the case (n); but, if the Court itself be imposed upon, it would be a strong measure to imply notice of the fraud to the purchaser, from the very proceedings before the Court. But it is a settled maxim that persons purchasing under decrees of the Court are bound to see that the sale is made according to the decree (o)(21).

- (1) Lloyd v. Johnes, 9 Ves. jun. 37; Curtis v. Price, 12 Ves. jun. 89; Bennett v. Harnell, 2 Scho. & Lef. 566; Burke v. Crosbie, 1 Ball & Beat. 489; Lightburne v. Swift, 2 Ball & Beat. 207. See Baker v. Morgan, 2 Dow, 526. Mullins v. Townsend, 1 Dow & Clark, 430.
- (m) Kennedy v. Daly, 1 Schoales & Lefroy, 355; Giffard v. Hort, ib.
  - (n) Gore v. Stacpole, 1 Dow, 30.
  - (o) Colclough v. Sterum, 3 Bligh, 181.
- (21) In Reed v. Carter, 1 Black. Indiana R. 410, where the sheriff sold under an execution, land valued at 1500 dollars or upwards for 351 dollars, under the following circumstances: viz. the debtor had previously paid the amount supposed to be due to the sheriff, and promised to pay the residue (if any) when called on. There was a balance left of 15 or 20 dollars; and for this balance the sheriff sold without calling on the debtor: but the court observed that a court of law could not interfere on motion; but relief might be obtained in chancery for such an abuse of power. See Tiernan v. Wilson, 6 J. Ch. 411, where it was held that the sheriff should sell only so much of the defendant's property as might be sufficient for the purpose, provided it can be sold separately.

Where the execution is issued on a judgment for an amount exceeding the ad damnum in the writ; and the levy is made for the full amount; the levy is void in respect to other attaching creditors; and also in respect to persons claiming title by intermediate conveyance. And it seems to be considered that there can be no apportionment in such case, so as to give the creditor a title to the property correspond-

A person having a legal lien, as a judgment-creditor not coming in under the decree, would not be bound by it, and might proceed against the purchaser, unless he obtained a legal interest over-reaching the lien; in which case the claim being merely in equity, the Court would protect the purchaser buying under its decree (p), or rather would not lend its aid to the judgment-creditor against him (22).

## (p) Barrett v. Blake, 2 Ball & Beat. 354.

ing in value to his attachment. Chickering r. Lovejoy, 13 Mass. 56. If the judgment, however, be for a penalty, the plaintiff may levy his whole debt independent of the charges of execution. Per Parsons, C. J. 4 Mass. 411. In a late case, it was held, that where the execution was levied upon land; and the appraisers valued the land 14 cents more than the amount of the execution, the extent was not invalid for this cause; for de minimis non curat lex. Spencer r. Champion, 9 Conn. R. 453.

In Den v. Despereaux, 9 Hals. R. 182, it was held, that where the sheriff's deed misrecites the execution, the purchaser will fail to show the authority of the sheriff to sell. So, in Den v. Whright, Pet. 66, U. S. C. C., the court held, that the sheriff's deed could not be given in evidence without producing the judgment and execution; these being necessary to show the authority of the sheriff'; and if the latter differ from the former, it is the same as if none were produced. It is different in New-York; the statute in the latter state not requiring the execution to be recited in the deed. 9 Cowen, 192; S. P. 10 Johns. 331.

(22) In the late case of The Eagle Fire Ins. Co. v. Cammet et al., 2 Edw. Ch. R. 127, the V. Ch. discharged a purchaser from his contract under a decree of foreclosure of a mortgage, on the ground, that the remainder man, who had the first estate of inheritance had not been made a party. The widow and daughter of the mortgagor were the only parties: and they were tenants for life only under the will of the mortgagor. This was not sufficient. In Gore v. Stackpole, 1 Dow's P. R. 18, a foreclosure, in a similar case, was opened by a remainder man fifty years afterwards. It was done upon the opinious of Lords Redesdale and Eldon.

In Foster v. Briggs, 3 Mass. 315, where the plaintiff made an attachment of land, which was under an incumbrance to its full value.

In sales by auction or private agreement, the contract is complete when the agreement is signed; but a different rule prevails in sales before a Master; the purchaser is not considered as entitled to the benefit of his contract till the Master's report of the purchaser's bidding is absolutely confirmed; and I shall now proceed to show (\*) what steps a purchaser must take to obtain an absolute confirmation of the Master's report (23).

The purchaser must first, at his own expense, procure a report from the Master, of his being the best bidder for the lot he has purchased. After the report is filed, and an office-copy of it taken by the purchaser, he must, at his own expense, apply to the Court by motion, of which no notice need be given(q), that the purchase may be confirmed. Upon this application the order will be confirmed nisi(r), that is, unless cause be shown against the same in eight days after service. The purchaser must, at his own expense, procure an office-copy of this order from the Register(I). If no cause be shown within the eight days, the purchaser must, at his own expense, apply to the Court to confirm the report absolutely, which will

(q) See Parker's Analysis, 141.

(r) For a form of the order, see 2 Fowler's Pract. 308.

## (I) See 3 & 4 W. 4, c. 94, s. 10.

Four days after he assisted in a negotiation by which the incumbrance was removed; and the premises sold to one G. under whom the defendant claimed. Parsons, C. J. "Whether at this time (the time of sale) his not disclosing his attachment, but assisting in the transaction was such a fraud upon G., as shall, at law, defeat his attachment, it is not necessary now to decide, as the justice of the case can be attained by the decision of another question. I am satisfied that, were we sitting here as a court of Chancery, with all the equitable powers of that court, we ought to set aside the plaintiff's attachment, on account of his fraudulent concealment of it disclosed in the case."

<sup>(23)</sup> See Monell v. Lawrence, 12 Johns. Rep. 521. contra. (\*59)

be done of course(s), on an affidavit of the service of the order(t), and a certificate of no cause having been shown. The certificate is obtained from the Register by application to the entering clerk, and leaving the order nisi the day before. Notice of this application need not be given(u). But if he be served with notice of a motion to open the biddings, he cannot regularly proceed to confirm his report absolutely(x).

If after having obtained the order nisi, the purchaser neglects to confirm the order, the vendor himself may make the motion(y).

The bidder not being considered as the purchaser (\*)until the report is confirmed, is not liable to any loss by fire or otherwise which may happen to the estate in the interim(z); nor is he, until the confirmation of the report, compellable to complete his purchase(a); but upon the report being confirmed, he will be compelled to carry the contract into execution(b).

If the purchaser neglect to complete his purchase, the practice is, to confirm the report, and then if the purchaser is supposed to be responsible, to get an order to inquire whether the party can make out a good title(c), and if he can, to obtain an order upon the purchaser to complete

<sup>(</sup>s) For a form of the order, see 2 Fowler's Pract. 311.

<sup>(</sup>t) For forms of the affidavit, see 2 Turn. Pract. 503. 522; Parker's Anal. 98; 2 Fowl. Pract. 310.

<sup>(</sup>u) See 1 Turn. Pract. 129.

<sup>(</sup>x) Vansittart v. Collier, 2 Sim. & Stu. 608.

<sup>(</sup>y) Chillingworth v. Chillingworth, 1 Sim. & Stu. 291.

<sup>(</sup>z) Ex parte Minor, 11 Ves. jun. 559; see 13 Ves. jun. 518; 1 Jac. & Walk. 639.

<sup>(</sup>a) Anon. 2 Vest. jun. 335.

<sup>(</sup>b) Barker v. Holford, and Eggington v. Flavel, 2 Anstr. 344, cited.

<sup>(</sup>c) Notice must be given of the motion for this order. For a form of the notice, see 2 Turner, 650.

his purchase(d)(I); but if the purchaser is unable to complete his purchase, then on the report being confirmed, it is moved to discharge him from the bidding(e), and notice of this motion must be given to the purchaser(f). But a purchaser will not be permitted to baffle the Court; and therefore, instead of discharging the purchaser from his bidding, the Court will, if required, make an order that he shall, within a given time, pay the money, or stand committed(g)(24).

- (d) See 2 Fowl. Pract. 318, 325.
- (e) Cunningham v. Williams, 2 Anstr. 344.
- (f) For a form of the notice, see 2 Turn. Pract. 651.
- (g) Lansdown r. Elderton, 14 Ves. jun. 512.
- (I) A motion was made before Lord Erskine, that the purchase-money should be paid in by the purchaser. The purchaser did not appear. After consulting the Register, who had searched for precedents, and expressing his unwillingness to do any thing to prejudice sales by the Court, the Chancellor refused the motion, but ordered the title to be referred to the Master; and then, he said, if a good title could be made he would compel payment of the money according to the usual practice. Anon. Ch. 22d July, 1806, MS.
- (24) A purchaser cannot object to any defect of title at a sheriff's sale, of which he had notice. Therefore, where lands were taken in execution; and at the time of sale by the sheriff one H. F. gave public notice that the land was his, and not the execution debtor's: held, that the vendee could not avail himself of such defect in the title as a defence against paying the purchase money. (Friedly v. Scheetz, 8 S. & R. 268.)

Duncan, J. in delivering the judgment of the court said "the sheriff conveys to the purchaser a free and clear estate, as fully and amply, as they were in the debtor. He enters into no covenant. Inadequacy of price alone is no objection to a sale under process of law. 11 Johns. 555. The rule of caveat emptor is binding on every purchaser at a sheriff's sale. Fraud, a clear mistake in the description of the property, its situation, its dimensions, would raise a different question. The learned judge added in conclusion in respect to a resale that, "the court were not called upon to give an opinion;" but said, "here the resale

(\*)When the report is absolutely confirmed, the purchaser is entitled to a conveyance on payment of the purchase-money, and may, after giving notice of his intention(h), apply to the Court for leave to pay his purchase-money into the Bank(i), and to be let into possession of the estate; but this application should of course not be made until the title be approved of(k). When the money is paid according to the order, the purchaser must, at his own expense, obtain a certificate of the payment of it.

If the estate be subject to an incumbrance, which appears upon the report, the purchaser should, after giving notice of his intention (l), apply to the Court for leave to pay off the charge, and to pay the residue of the purchase-money into the Bank. But where an incum-

- (h) For forms of the notice, see 2 Turn. Pr. 647; Park. Anal. 140.
- (i) For the mode of paying the money into the Bank, see 1 Turn. Pract. 210; and for a form of the order, see 2 Fowl. Pract. 313.
  - (k) See 2 Fowl. Pract. 317.
  - (1) For a form of such notice, see 2 Turn. Pract. 648.

was at the risk of the purchaser, and on a resale made by a sheriff for the purchaser's non-compliance, the purchaser would not be entitled to any surplus, though he would be accountable for any deficiency." But where the resale is on account of the purchaser, it is different. The case of Webster et al. r. Hoban, 7 Cranch, 399, was an action on the sale itself; and the condition of the sale was, that the purchaser should secure the purchase money within 30 days; and in default of so doing the property was to be resold on his account. The court held, that the purchaser was clearly entitled to the surplus. In respect to the case first cited, it may be observed that, "if the defendant had not given the obligation, the sheriff might have returned the property to the next bidder, sold again, and have sued for the difference; or he might have made a special return, that the premises were knocked down to the defendant, and that he not having paid the purchase money, therefore the premises remained unsold." Tantinger v. Pole, 1 Dall. 458. Or, he might as he did in that case, return them sold, tender the conveyance, and sue for the purchase-money on the obligation.

brance on the estate does not appear on the report, and any of the parties refuse, or are incompetent to consent, a purchaser cannot apply any part of his purchase-money in discharge of the incumbrance, though perhaps, if the parties be all competent to consent, and do consent, it may be done(m).

Where two or more persons purchase one lot, the money must be paid altogether; the Court will not allow them to pay their proportions separately, on account of the confusion which might  $\operatorname{ensue}(n)$ .

A purchaser under a decree is entitled to be let into possession of the estate from the quarter-day preceding his purchase, paying his money before the following (\*)one(o). But this rule does not apply to a colliery, which is considered as a trade. The profits are settled monthly, and therefore the purchaser is entitled to the profits only from the commencement of the month in which he purchased, paying his purchase-money in the course of that month(p).

If a life interest in stock be sold, the purchaser is entitled to the dividend which becomes due after the sale, although it falls due the very day after (q).

A purchaser is not entitled to the rents for a period beyond the quarter-day preceding the payment of his money, merely because he has been ready to complete his purchase, and had his money ready lying dead in a banker's hands; for he might have moved to pay the money into Court, when it would have been laid out:

<sup>(</sup>m) -- v. Stretton, 1 Ves. jun. 266.

<sup>(</sup>n) Darkin v. Marye, 1 Anst. 22.

<sup>(</sup>o) Twigg v. Fifield, 13 Ves. jun. 517; see Garrick v. Earl Camden, 2 Cox, 231; vide post. ch. 10.

<sup>(</sup>p) Wren v. Kirton, 8 Ves. jun. 502; Williams v. Attenborough, 1 Turn. 70.

<sup>(</sup>q) Anson v. Towgood, 1 Jac. & Walk. 637.

<sup>(\*62)</sup> 

and this, if done by special application, would not have been an acceptance of the title(r).

If a purchaser enter into possession, he will be compelled to pay the money into Court, although he entered with the permission of the parties in the cause. The Court only can give such permission(s).

When the report is absolutely confirmed, and every thing arranged, the draft of the conveyance must be drawn by the purchaser's solicitor, and either settled by the Master, if the parties insist upon it, or, which is more customary, by a conveyancing counsel of whom the Master approves. Sufficient time must be allowed for copies to be made for such parties in the cause as require (\*)them, and then warrants must be taken out to proceed on the draft. The Master's clerk will, at the purchaser's expense, ingross the deed, procure the report or certificate of its being allowed, and then deliver the deeds to the purchasers; and it is usual to obtain the Master's signature to every skin. The report must be filed, and an office-copy of it taken(t).

It is usual, however, to so word decrees, that the draft shall not go before the Master unless the parties differ. Where this mode is adopted, the business is transacted in the same way as upon a sale by private contract, unless the parties cannot agree, in which case, resort is had to the Master.

When the decds have been properly executed by all necessary parties, an affidavit of the due execution of them must be made, and filed in the affidavit office, and an office-copy of the affidavit must be taken: this being done, the money directed to be paid in consequence thereof, may be procured in the usual manner (u).

- (r) Barker v. Harper, Coop. 32.
- (s) Anon. L. I. Hall, 16 July 1816, MS.
- (t) 1 Turn. Pract. 145.
- (u) 1 Turn. Pract. 145.

If the parties disagree as to the necessary parties, &c. to the conveyance, the Master will report his approbation of the draft, as settled by him. To this report exceptions may be taken(x), and then the question will come before the Court in a regular way.

So if the parties differ as to the validity of the title to the estate, the Master must make his report upon the title, to which exceptions may in like manner be taken(y).

If the title prove bad, the purchaser will be paid the costs of the reference out of the funds in the cause(z); (\*)and if there are no funds in Court, the plaintiff will in a common case be ordered to pay the purchaser his costs in the first instance(a).

In a case where there was error in the decree under which the estate was sold, the purchaser was discharged, upon motion, from his purchase, although the parties were proceeding to rectify it(b).

If a purchaser of an estate under a decree of the Court, after the absolute confirmation of the report, and before any conveyance made to him, die, having devised his interest therein, the Court will order a conveyance to be made to the devisees, without the consent of the testator's heir at law, where he is an  $\inf(c)$ .

If an estate directed to be sold before a Master, is sold by private contract, or in any other manner contrary to the order of the Court, and not actually conveyed to the purchaser, the Court will not take notice of the sale, but will direct the estate to be sold before the Master, accord-

<sup>(</sup>x) Lloyd v. Griffith, 1 Dick. 103; Tipping v. Gartside, 2 Fowl. Pract. 328; Wakeman v. Duchess of Rutland, 3 Ves. jun. 504.

<sup>(</sup>y) For forms of exceptions, see 2 Turn. Pract. 589.

<sup>(</sup>z) Reynolds v. Blake, 2 Sim. & Stu. 117.

<sup>(</sup>a) Smith v. Nelson, 2 Sim. & Stu. 557.

<sup>(</sup>b) Lechmere v. Brasier, 2 Jac. & Walk. 287.

<sup>(</sup>c) The King v. Gregory, 4 Price, 380.

<sup>(\*64)</sup> 

ing to the decree(d)(25). And a person who has notice of the decree cannot be advised to purchase the estate unless it be sold before the Master(e): and the money should be paid into court and not to the party(f).

If an estate be sold contrary to the order of the Court, and the purchaser had notice of the decree, he will have no remedy (26); but if he bought without notice, he may recover at law for breach of the agreement (g).

A sale before a Master is not within the statute of frauds, and after confirmation of the Master's report of the (\*)best purchaser, the sale will be carried into effect even against the representative of the purchaser, although he did not subscribe; the judgment of the Court taking it out of the statute(h).

And even if the authority of an agent not being admitted cannot be proved, yet if the Master's report could be confirmed, the sale would be carried into execution unless some fraud were proved (i).

As a purchaser under a decree does by the act of purchase submit himself to the jurisdiction of the Court, he may, if he obtain possession of the estate before the con-

<sup>(</sup>d) Annesley v. Ashurst, 3 P. Wms. 282. See and consider ex parte Hughes, 6 Ves. jun. 617.

<sup>(</sup>e) See 2 vol. Ca. and Opin. 224, 225.

<sup>(</sup>f) See 2 Scho. & Lef. 581.

<sup>(</sup>g) Raymond v. Webb, Lofft, 66: See Mortlock v. Buller, 10 Ves. jun. 314.

<sup>(</sup>h) Att. Gen. v. Day, 1 Ves. 218.

<sup>(</sup>i) Ibid.

<sup>(25)</sup> Sales of mortgaged lands, under a decree, must be made by a master, or under his immediate direction. A sale by a person deputed for the purpose by a master, in his absence, is irregular, and will be set aside. Heyer v. Deaves, 2 Johns. Ch. Rep. 154.

<sup>(26)</sup> See Quarles v. Lacy, 4 Munf. 251.

tract is completed, be restrained by injunction from committing waste(j).

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#### SECTION II.

Of opening the Biddings, and of rescinding the Contract.

Thus far we have traced a sale before a Master where no opposition is made to the absolute confirmation of the Master's report of the best bidder, and the sale is regularly concluded. But where estates are sold before a Master under the decree of a court of equity, the Court considers itself to have a greater power over the contract than it would have were the contract made between party and party(k); and as the chief aim of the Court is to obtain as great a price for the estate as can possibly be got, it is in the habit of opening the biddings after the estate is sold(27). It seems to have been thought that the

<sup>(</sup>j) Cassamajor v. Strode, 1 Sim. & Stu. 381.

<sup>(</sup>k) See 1 P. Wms. 747.

<sup>(27)</sup> See Fairfax v. Muse's Exrs. 4 Munf. 124. Ford v. Herron,4 Munf. 316. Wood's Exr. v. Hudson, 5 Munf. 423.

In the State of New-York, the English practice of opening biddings at a master's sale, is not adopted: But where the executors of a mortgage were innocently misled, and induced to believe, that the sale of the premises would not take place on the day appointed, and there being no culpable negligence on their part, the court, under the special circumstances of the case, set aside the sale, and ordered a re-sale, on condition that the defendant should pay the purchaser all his costs and expenses, and the costs of the application, though the sale was perfectly fair. Williamson v. Dale, 3 Johns. Ch. Rep. 290. See Lansing v. M'Pherson, 3 Johns. Ch. Rep. 424.

(\*)same rule may be extended to sales under a commission of bankruptcy(l). This, however, never has been done, nor is there any reason to apprehend that so mischievous an extension of the rule will ever take place.

Where a person is desirous of opening a bidding, he must, at his own expense, apply to the Court, by motion for that purpose, stating the advance offered. Notice of the motion must be given to the person reported the purchaser of the lot, and to the parties in the cause(m). If the Court approve of the sum offered, the application will be granted, and on the order being drawn up, entered and served, a new sale must be had before the Master. The order is made at the expense of the person opening the biddings, and he must bear the expense of paying in his deposit, and pay the costs of the first purchaser(n), and interest at the rate of 4l. per cent. on such part of the purchase-money as the Master shall find to have lain dead(o).

Mere advance of price, if the report of the purchaser being the best bidder is not absolutely confirmed, is sufficient to open the biddings, and they will be opened more than once, even on the application of the same person, if a sufficient advance be offered (p); but the Court will stipulate for the price, and not permit the biddings to be opened upon a small advance (q); and, although an advance of 10 per cent. used generally to be considered suffi-

- (1) Ex parte Partington, 1 Ball & Beatty, 209.
- (m) For a form of the notice, see 2 Turn. Pract. 649, 650.
- (n) 2 Fowl. Pract. 318; 1 Turner's Pract. 131.
- (o) This was directed on opening the biddings for Gen. Birch's estate, MS.
- (p) Scott v. Nisbitt, 3 Bro. C. C. 475; Hodges v. Jones, 2 Fowl. Pract. 318; see Baillie v. Chaigneau, 6 Bro. P. C. by Toml. 313; Preston v. Barker, 15 Ves. jun. 140.
- (q) Anon. 1 Ves. jun. 453; Anon. 2 Ves. jun. 487; Upton v. Lord Ferrers, 4 Ves. jun. 700; and Anon. 5 Ves. jun. 148.

(\*)cient on a large sum, yet no such rule now prevails(r); but in the case of a sale under a creditor's suit, the Court permitted the biddings to be opened, upon an advance of 5 per cent on 10,000l.(s). An advance of 350l. upon 5,300l. was refused, and it was said that the former cases only established that where an advance so large as 500l. is offered the Court will act upon it, though it be less than 10 per cent(t). Biddings, it seems, will not be opened unless 40l. at least be offered in advance(u); and the common rule does not apply to a colliery(w).

The determinations on this subject assume a very different aspect when the report is absolutely confirmed. Biddings are in general not to be opened after confirmation of the report(x): increase of price alone is not sufficient, however large, although it is a strong auxiliary

argument where there are other grounds.

In a case(y), however, before Lord Rosslyn, this rule, although so frequently acknowledged and acted upon, was not attended to, but biddings were opened after the report was absolutely confirmed, merely on an advance of price. This case is now completely overruled.

But very particular circumstances may perhaps induce

- (r) Andrews v. Emerson, 7 Ves. jun. 4; White v. Wilson, 14 Ves. jun. 151. See Anon. 3 Madd. 494.
  - (s) Brooks v. Snaith, 3 Ves. & Bea. 144.
- (t) Garstone v. Edwards, 1 Sim. & Stu. 20; Lefroy v. Lefroy, 2 Russ. 606.
- (u) Farlow v. Weildon, 4 Madd. 460; Brookfield v. Bradley, 1 Sim. & Stu. 23.
  - (w) Williams v. Attenborough, 1 Turn. 70.
- (x) 2 Ves. jun. 53; Scott v. Nisbitt, 3 Bro. C. C. 475; Boyer v. Blackwell, 3 Anstr. 656; Prideaux v. Prideaux, 1 Bro. C. C. 287; 2 Ves. jun. 53; 1 Cox, 35.
- (y) Chetham v. Grugeon, 5 Ves. jun. 86; and see his Lordship's decision in Prideaux v. Prideaux, ubi sup. when Lord Commissioner. (\*67)

the Court to open the biddings after confirmation of the report, if the advance be considerable(I).

(\*)Thus, in a case(z) where the owner of the estate (who joined in a motion for the purpose of opening biddings after the report was absolutely confirmed) was in prison at the time of the confirmation, and it appeared that he would have opened the biddings before confirmation of the report, had he been able, and had even directed persons to bid more than what the estate sold for, who deceived him, and an advance of 4,000l. (being more than one fourth of the original purchase-money) was offered, the biddings were opened on the deposit of the 4,000l. being made.

Strong as the circumstances in this case were, Lord Eldon, in a late case, expressed great disapprobation of the decision, and determined generally, that after a purchaser has confirmed his report, unless some particular principle arises out of his character, as connected with the ownership of the estate, or some trust or confidence, or his own conduct in obtaining his report, the bidding ought not to be opened (a).

And Lord Redesdale, also, in a case before him, held that biddings could not be opened after the report was absolutely confirmed, unless on the ground of fraud on the part of the purchaser. And he considered it to the advantage of suitors to observe greater strictness in opening biddings, as it would procure better sales(b).

- (z) Watson v. Birch, 2 Ves. jun. 51; 4 Bro. C. C. 172.
- (a) Morice v. the Bishop of Durham, 11 Ves. jun. 57.
- (b) Fergus v. Gore, 1 Schoales & Lefroy, 350.

<sup>(</sup>I) In Ireland, a sale under a decree was actually set aside after the purchaser was put in possession, and the conveyance to him executed and registered, because another person offered 200l. more than the purchaser had paid. Conran v. Barry, Vern. and Scriv. 111. See Exparte Partington, 1 Ball and Beatty, 209.

In a still later case, Lord Eldon adhered to the same rule, and said that he could not do a thing more mischievous to the suitors than to relax further the binding nature of contracts in the Master's office: half the estates (\*)that are sold in the Court being thrown away upon the speculation that there will be an opportunity of purchasing them afterwards by opening the biddings(c).

Fraud will, of course, be a sufficient ground for opening the biddings. Therefore, if the parties agree not to bid against each other (d), or a survey be made of an estate with some degree of collusion with the tenants (e), and it misrepresents the value and quality of the estate, and some of the purchasers are aware of this fraud in making the survey, and the owner is ignorant of it; or the purchaser of the estate be partner with the solicitor of the cause, and is in possession of some particular knowledge to the benefit of which the other parties were entitled (f); in all these cases the Court would open the biddings, although the report had been absolutely confirmed.

Where the biddings are opened, the advance is ordered to be deposited immediately (g), and the costs of the purchaser to be paid by the persons opening the biddings (h); but the Court will not direct the Master to allow a specific expense (i).

If the biddings are opened, the estate may be allotted for sale in a different manner to what it at first was(j).

- (c) White v. Wilson, 14 Ves. jun. 151.
- (d) See 2 Ves. jun. 52.
- (e) Ryder v. Gower, 6 Bro. P. C. 148; and see 2 Ves. jun. 53.
- (f) Price v. Moxon, July 14, 1754, before Lord Hardwicke. See6 Bro. P. C. 155; 2 Ves. jun. 54.
  - (g) Anon. 6 Ves. jun. 513.
- (h) See Watts v. Martin, 4 Bro. C. C. 113; and see ibid. 178; Upton v. Lord Ferrers, 4 Ves. jun. 700.
  - (i) Annon. 1 Ves. jun. 286.
  - (j) Watts v. Martin, 4 Bro. C. C. 113.

(\*69)

As the biddings are opened for the benefit of the suitor, no other person will be favored in that respect.

Thus, upon a motion to open a bidding of 5,020l.(k) upon the ground of mistake as to the time of sale, and an over-bidding of 150l.; the Lord Chancellor refused it, (\*)saying, he would not open it for a less sum than 500l. and that the circumstance that the bidder was too late was no ground at all.

The person who is desirous of opening the biddings having been present at the sale, is no objection to their being opened, although a greater advance may, on that account, be required(l). Nor is it material that the applicant is entitled to a part of the produce of the estates(m).

A man opening the biddings on behalf of a person not in existence, will himself be decreed to be the purchaser (n).

Where a person is permitted to open the biddings upon the usual terms, paying the costs, and making a deposit, and the estate is bought by another person, the person opening the biddings is entitled to take back his deposit; but he is not entitled to an allowance for his costs, as they are in the nature of a premium paid by him for the opportunity of bidding(o).

Under special circumstances, however, they might be allowed. If a person come forward for the benefit of the

<sup>(</sup>k) Anon. 1 Ves. jun. 453.

<sup>(</sup>l) Rigby v. M'Namara, 6 Ves. jun. 117. See Tait v. Lord Northwick, 5 Ves. jun. 555; see 15 Ves. jun. 14; and see M'Cullock v. Cotbach, 3 Madd. 314, where the Vice-Chancellor ruled contra; but the rule is established by Thornhill v. Thornhill, 2 Jac. & Walk. 347; Pearson v. Pearson, 13 Price, 213; Tyndale v. Warre, 1 Jac. 525; Lefroy v. Lefroy, 2 Russ. 606.

<sup>(</sup>m) Hooper v. Goodwin, Coop. 95.

<sup>(</sup>n) Molesworth v. Opie, 1 Dick. 289.

<sup>(</sup>o) Rigby v. M'Namara, 6 Ves. jun. 466; Earl of Macclesfield v. Blake, 8 Ves. jun. 214; Trefusis v. Clinton, 1 Ves. & Beam. 361.

family, and the estate at the first sale was knocked down by mistake, or sold at a great under-value, he will be allowed his expenses (p).

It seems, that if a person purchase several lots of an (\*)estate, and the biddings are opened as to one, he shall have an option to open them all(q).

In two late cases the distinction was taken that where the lots, the biddings for which are sought to be opened, were purchased before the other lots bought by the same purchaser, he is entitled to have the biddings opened as to all the lots(r).

If a purchase be rescinded, and the purchaser has paid his money into court, and it has been laid out upon his application, he is to take back the stock, whether the funds have fallen or risen since the investment(s).

The authority which the Court has over these contracts enables it in a proper case to relieve the purchaser as well as the suitor.

Therefore, where the contract is inequitable, the purchaser, on submitting to forfeit his deposit, will be discharged from his purchase(t). Where, however, the contract is not inequitable, a purchaser must proceed in his purchase, and will not be permitted to forfeit his deposit, and abandon the contract, however disadvantageous it may be.

Thus, on an application to the Court by the persons who opened the biddings for General Birch's estate (u), to forfeit their deposit, which was resisted by the creditors

<sup>(</sup>p) Earl of Macclesfield v. Blake, ubi sup.; Owen v. Foulks, 9 Ves. jun. 348; West v. Vincent, 12 Ves. jun. 6.

<sup>(</sup>q) See 2 Anstr. 657; ex parte Tilsley, 4 Madd. 227. n.

<sup>(</sup>r) Price v. Price, 1 Sim. & Stu. 386.

<sup>(</sup>s) Hodder v. Ruffin, V. C., 21 Mar. 1825, MS.

<sup>(</sup>t) Savile v. Savile, 1 P. Wms. 745.

<sup>(</sup>u) MS.; and see Sewell v. Johnson, Bumb. 76.

<sup>(\*71)</sup> 

for whose benefit the estate was sold; the Court held the purchasers to their bargain, and would not permit them to rescind the contract, although they had given a price which was considered much beyond the value of the estate.

(\*)But where the purchaser has by mistake given an unreasonable price for the estate, the Court will in a proper case wholly rescind the contract.

This equity was enforced in the case of Morshead v. Frederick(w), where it appeared that Smiths, the bankers, were tenants in possession of the house in question, for . which they paid two rents, one a ground rent of 56l. to the defendant, and the other an improved rent of 210l. to a third person. The house was directed to be sold, under a decree; and the plaintiffs, by a broker, treated for the purchase of it, and employed him to value it. The broker had an interview with the attorney concerned in the sale, who stated, that the rent payable for the house was the 56l. and the broker valued the estate accordingly. A written agreement was not entered into, but the contract was approved of by the Master, and the money paid into the Bank. The purchasers then moved the Court to rescind the contract, on the ground of mistake, and the broker proved that the purchasers had not informed him of the rent of 210l.; and that he was ignorant of the existence of it at the time he made his valuation: and the Court ordered the purchase-money to be repaid, and rescinded the contract. This, however, may be considered a strong case. It might be argued that the purchasers' only equity was their own negligence.

Although the solicitor in the cause buy in an estate merely to prevent a sale at an undervalue, yet if he act without authority he will not be discharged from his

<sup>(</sup>w) Ch. 20 Feb. 1806, MS. App. No. 10. VOL. 1. (\*72)

purchase. Lord Eldon has said, that it would be a very wholesome rule to lay down, that the solicitor in the cause should have nothing to do with the sale; as the certain (\*)effect of a bidding by the solicitor in the cause is that the sale is immediately chilled(x).

The same rule has been applied to assignees of a bankrupt, who, without authority, bought in an estate ordered to be sold by the Court upon a petition of a

mortgagee(y).

It may be observed, in this place, that if a bankrupt's estate be sold, and the purchaser pay a deposit, and then the commission is superseded, the Lord Chancellor will, upon petition, order the deposit to be returned, without driving the purchaser to file a bill(z).

Where a person bought under the decree for another who died without having adopted the contract, although an order nisi to confirm the purchase in his name had been obtained, the Court refused to order the executors of the purchaser to pay the purchase-money, and the heir declining the purchase, the order nisi was set aside, and a re-sale ordered, and the consideration as to any deficiency that might arise on the re-sale, and by whom the costs of it were to be repaid, were reserved; it was held that the executors, in a purchase by their testator from the Court, would not be compelled by the heir to pay for the estate without filing a bill(a).

If an extended estate be sold under the 25 Geo. 3, c. 35, and the sale be confirmed by the Remembrancer's report, and the usual orders, yet where a good title cannot be made, the court of Exchequer will, upon the

<sup>(</sup>x) Nelthorpe v. Pennyman, 14 Ves. jun. 517.

<sup>(</sup>y) Ex parte Tomkins, Ch. 23d Aug. 1816, MS. App. No. 12.

<sup>(</sup>z) Ex parte Fector, 1 Buck, 428.

<sup>(</sup>a) Lord v. Lord, 1 Sim. 503.

<sup>(\*73)</sup> 

motion of the Crown, discharge the purchaser without payment to him of any costs incurred in investigating the title, or in procuring the reports(b)(28).

### (b) Rex v. Cracroft, 1 M'Clel. & You. 460.

(28) The case of Lawrence v. Monell, 12 Johns, 521, was thus: The respondent Lawrence holding a mortgage against one Sackett; and the defendant Monell having two judgments against Sackett; and the defendant, Wood, having a deed of the mortgaged premises, from Sackett, in trust for all his creditors, the respondent filed his bill to foreclose the mortgage; upon which the parties entered into an agreement that the premises should be sold under the direction of a master in Chancery, and the proceeds paid into court; out of which Lawrence was to be paid; and the rights of M. W. & S. preserved respectively. A decree was made pursuant to this agreement; and the master advertised the sale. Before the sale, the interest of Sackett was sold under an execution in favor of one G.; but of the judgment on which it issued Monell had become the owner; and became the purchaser at the Sheriff's sale. The object of Monell in this was to overreach the deed to Wood in trust; because G.'s judgment was prior to the latter deed; but the latter deed was prior to Monell's last judgment. Monell then paid Lawrence his mortgage merely taking a receipt. "Received from Mr. Geo. Monell one of the defendants in this cause, 3,932 & 90." This payment was considered by the solicitor of the mortgagee only as a deposite until the sale by the master had been made: for so indeed the solicitor of the mortgagee testified. Monell then applied to dismiss the bill under which a sale had been ordered, but this being denied, the sale by the master took place, the sale confirmed: held, that a sale by an officer of the court, will not be set aside; but the rights of bona fide purchasers, under such sale, will be protected. Yeates, J. said that "The English rule, requiring a confirmation of the master's report was not applicable here. In England, proceedings are different: the master opens a book for biddings, and all remains in an unfinished state, and under the perfect control of the court, until the The master, there, has no authorireport of sales is confirmed. ty to execute a conveyance; that is done by the parties in interest only; and until a confirmation of his report; the whole of the business, in relation to the biddings transacted before him, continues open for the exercise of the discretion of the court. Here, the confirmation of the master's report, before the deeds are executed, is not essential; it has been rendered unnecessary by the statute, in giving the master

authority to convey to the purchasers. The confirmation of the report, if the sale has been fairly conducted, is of course. And Thompson, J. added in conclusion, "There has been no suggestion that the decree by consent was obtained by fraud or imposition, or that the mortgaged premises were not sold for their full value; and he (Monell) is now seeking to set aside this sale, made pursuant to his own agreement, for the purpose of vesting in himself, solely, the title, and to prevent the equitable distribution of the surplus among the creditors of Sackett. The order of the Chancellor therefore, was affirmed; but Spencer, J. and 10 senators voted for reversing.

# (\*)CHAPTER III.

OF PAROL AGREEMENTS AND PAROL EVIDENCE.

WITH a view to prevent many fraudulent practices which were commonly endeavored to be upheld by perjury, it was enacted by the 29 Car. II. c. 3, usually called the statute of frauds, that (a) "all leases, estates, interests of freeholds, or terms of years, or any uncertain interest of, in, or out of any messuages, manors, lands, tenements or hereditaments, made and created by livery and seisin only, or by parol, and not put in writing by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the effect of leases or estates at will, any consideration for making any such parol leases or estates notwithstanding." But, nevertheless, leases not exceeding three years, whereupon the reserved rent should amount to two thirds of the full improved value, were excepted(b). The Act then requires the assignment, grant, and surrender of existing interests to be made by writing(c); and then(d) enacts that "no action shall be brought, whereby to charge any person upon any agreement made upon any contract, or sale of lands, tenements, or hereditaments, or any interest

<sup>(</sup>a) Sect. 1.

<sup>(</sup>b) Sect. 2.

<sup>(\*74)</sup> 

<sup>(</sup>c) Sect. 3.

<sup>(</sup>d) Sect. 4.

in or concerning them(I)(29), unless the agreement, upon (\*)which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

In treating of these legislative provisions, we may consider—1. What interests are within the statute:—2. What is a sufficient agreement:—3. What agreements will be enforced, although by parol;—and 4. In what cases parol evidence is admissible to vary or annul written instruments.

<sup>(</sup>I) "Or upon any agreement not to be performed within a year;" which clause does not extend to any agreement concerning lands. Hollis v. Edwards, 1 Vern. 159. It is quite clear, that an agreement for sale of lands must be in writing, although the contract is to be performed the next day. See Bracebridge v. Heald, 1 Barn. and Ald. 722.

<sup>(29)</sup> MEMORANDUM. In most of the United States, provisions by statute, for the prevention of frauds and perjuries, have been found necessary. The English Statute of 29 Car. 2. c. 3. has been the guide to legislative enactments on this subject. In some of the states, this act has been adopted, almost verbatim; in others, similar provisions, though with some modification, have been enacted. The want of uniformity of legislation, in the different states, has given rise to a corresponding diversity of judicial opinions. For a similar reason, the American decisions, on certain points, are not always in unison with those of Westminster Hall: But wherever the provisions of the English statute have been re-enacted, the construction given them by the English courts, has, generally, been adopted by our own. [Downey v. Hotchkiss, 2 Day, 225.] The American decisions referred to in this edition of Mr. Sugden's Treatise, either in support, or contradiction of the principles laid down by him, are to be understood as having reference to the legislative acts of the states, respectively, where such decisions were pronounced.

#### SECTION I.

Of the Interests which are within the Statute.

It was observed in the case of Crosby v. Wadsworth(e), that collecting the meaning of the first section by aid derived from the language and terms of the second section, and the exception therein contained, the leases, &c. meant to be vacated by the first section, must be understood as leases of the like kind with those in the second section. but which conveyed a larger interest to the party than for a term of three years, and such, also, as were made under a rent reserved thereupon; and the Court therefore determined that a sale of a standing crop of mowing grass, then growing, was not within the first section of the statute, because neither of the foregoing circumstances were to be found in the agreement, although, as the agreement conferred an exclusive right to the vesture of the land during a limited time, and for given purposes, it was, the Court held, a contract or sale of an interest in. or at least an interest concerning lands.

It was not, however, necessary in the above case, to (\*)decide upon the precise construction of the first section, which seems in this respect to be co-extensive with the fourth, and, consequently, every interest which is within the fourth section is equally within the first, unless it come within the saving of the second section. The first and second sections appear to enact, that all interests actually created without writing shall be void, unless in the case of a lease not exceeding three years, at nearly rack-rent, which exception must have been introduced

ond section.

for the convenience of mankind, and under an impression that such an interest would not be a sufficient temptation to induce men to commit perjury. Perhaps, therefore, the first section ought to extend to every possible interest which is not within the exception in the second clause. If an estate, of whatever value, should be conveyed to a purchaser by livery of seisin, without writing, the act would avoid the estate, although the purchaser had paid his money. An actual lease for any given number of years, whether with or without rent, or any interest uncertain in point of duration, must, it should seem, equally fall within the provision of the first section, and cannot be sustained unless it come within the saving in the sec-

This, however, of itself would not have prevented all the evils which the act intended to avoid; for although actual estates could not be created, yet still parol agreements might have been entered into respecting the future creation of them. To remedy this mischief, the provision in the fourth section was inserted, which, it is conceived, relates not to contracts or sales of lands, &c. but to any agreement made upon any contract or sale of lands, &c.(1),

<sup>(</sup>I) This appears to be the true meaning of the statute, although this branch of the fourth section has been sometimes read as a distinct clause, in which case the word agreement is dropped, and the clause runs thus, "no action to be brought upon any contract or sale of lands," &c. See Anon. 1 Ventr. 361, and 6 East, 611; but this clause seems to be governed by the preceding one in the same section, as to agreements made upon consideration of marriage. The statute says, no action to be brought, "to charge any person upon any agreement made upon any consideration of marriage, or upon [any agreement made upon] any contract or sale of lands," &c. The words between crotchets must, it is submitted, be implied. At the same time, there is certainly ground to contend, that the clause would have the same operation if not governed by the words in the preceding clause.

The statute seems to have been strangely misunderstood in the case of Charlewood v. Duke of Bedford, 1 Atk. 497, the report of which

(\*)and as agreements were more to be dreaded than contracts actually executed, no exception was inserted after (\*)the fourth section, similar to that which follows the first section, and consequently an agreement by parol, to create even such an interest as is excepted in the second section, would be merely void.

If this be the true construction of the Act it answers the purposes for which it was passed, and the question in all cases must be—Is the interest in dispute actually created by the parties, or does the contract rest in fieri? If it be actually created, it is avoided by the first section,

agrees with the Registrar's book. The object of the bill was to compel the performance in specie of a parol agreement, by the Duke's steward, to grant a lease. The case, therefore, fell within the fourth section, but the defendant pleaded the first, and to bring his case within it, stated the words of the statute, at the close of that section, to be "any contract for making such lease, or any former law to the contrary notwithstanding." The words really are "any consideration, &c." The framer of the plea must have adopted an error which has been sometimes entertained, that the first section relates to leases, and the fourth to sales, and this notion compelled him to alter the statute in the way he did, for he could not otherwise have brought his case within it. It is observable that Lord C. B. Comyns, before whom the cause was heard, did not notice the mistake.

Lord Keeper North seems to have entertained the erroneous opinion above noticed; for, in a case which came before him on a parol agreement for a lease, he said that the difficulty that arose upon the act was that it makes void the estate, but does not say the agreement itself shall be void, and therefore, though the estate itself is void, yet, possibly, the agreement may subsist, so that a man may recover damages at law for the non-performance of it; and if so, he should not doubt to decree it in equity; and he actually sent the parties to law, in order to have the point decided, and for that purpose directed the defendant to admit the agreement. Hollis v. Edwards, 1 Vern. 159. The plaintiff was of course nonsuited in the action, and thereupon Lord North dismissed the bill. His impression before the trial must, it should seem, have been that the first section related to leases, and the fourth only to sales; or at least he must have thought that the fourth did not embrace agreements for leases.

unless saved by the second. If it be not actually created, the agreement cannot be enforced by reason of the fourth section, whatever be the nature of it. But if the first section were to be restrained beyond the express provisions of the second section, then, although every parol agreement for any interest in lands would be void, yet many estates might still be actually raised by parol. The first section, however, seems to embrace interests of every description, whilst the exception relates only to leases of a particular description. One consequence of qualifying all the interests specified in the first section, in the manner proposed by the aid derived from the second section, would be, that an estate in fee might still, as formerly, be conveyed by livery of seisin without writing. But if the doctrine should even be confined to leases, yet it would open a considerable door to perjury. If the two requisites are to concur to bring a lease within the first section, namely, a larger interest than that mentioned in the second section, and a reserved rent, then it should seem that a lease by parol for a thousand years without rent would be valid, notwithstanding the statute. If even one only of these requisites be essential, yet cases of importance may be taken out of the Act; an estate, however valuable, may be claimed under a parol lease for any term short of three years without rent. This is the temptation to perjury which the statute intended to remove. And (\*)this mischief must necessarily follow, that if the parties swear to an agreement for such an interest it will be within the statute; whereas if they swear to an actual demise the case will be taken out of the statute.

The construction suggested in Crosby v. Wadsworth, of the first section of the statute, has since been attempted to be extended to the third section. It has been contended that the leases mentioned in the third section, as requiring to be assigned by writing, must be intended such leases as are required by the first and second sections of the (\*79)

statute to be created by deed or writing, viz. leases conveying a larger interest to the party than for a term of three years; but the Lord C. Baron, at nisi prius, ruled otherwise, and appears to have held, that although an interest was created by parol, by virtue of the second section, yet it cannot be assigned without a note in writing, by reason of the third section(f). And even a tenancy from year to year created by parol, cannot be surrendered, although by mutual consent, by parol(g).

But it has been decided, that a mere license is not within the first section of the statute of frauds. This was decided in the case of Wood v. Lake(h)(30). A parol

(f) See Botting v. Martin, 1 Camp. Ca. 13, but qu. whether the agreement or the assignment was by parol.

(g) Mollet v. Brayne, 2 Camp. Ca. 103. See Stone v. Whiting, 2 Stark. 235; Thomson v. Wilson, 2 Stark. 379; Phipps v. Sculthorpe, 1 Barn. & Ald. 50; Thomas v. Cook, 2 Stark. 408; 2 Barn. & Ald. 119.

(h) Say. 3; and see Winter v. Brockwell, 8 East, 308; Rex v. Inhabitants of Standon, 2 Mau. & Selw. 461; Tayler v. Waters, 2 Marsh, 551; 7 Taunt. 74; Rex v. Inhabitants of Horndon, 4 Mau. & Selw. 562.

<sup>(30)</sup> See Cook v. Stearns, 11 Mass. Rep. 533, 536. Ricker v. Kelley, 1 Greenl. Rep. 117. Thompson v. Gregory, 4 Johns. Rep. 81. Jackson v. Buell, 9 Johns. Rep. 298.

In Cook v. Stearns, where the defendant claimed the right by license of the former owner of the land to make the dam, bank and canal in question, the possession of the locus in quo being admitted to be in the plaintiff: and he claimed the right of entering thereon to repair and remove obstructions; "because those, whose estate the plaintiff now holds, permitted him to enter and make the bank, and dig the canal;" and without describing the mill as ancient, or setting up any prescriptive right to an easement in the close of the plaintiff, he "alleges that he had the consent, legally obtained, to erect his works, of the former owner of the close; and because of that consent, the works being out of repair, he entered to make the necessary repairs." The Court considered the plea of the defendant bad; it not shewing such a license as may be

agreement was entered into for liberty to stack coals on part of a close for seven years, and that during this term the person to whom it was granted should have the sole use (\*)of that part of the close upon which he was to have the liberty of stacking coals(I). Lee, C. J. and Dennison, held the agreement to be good. They relied upon the case of Webb and Paternoster(i), where they said it is

(i) Palm. 71.

(I) Sayer is but an inaccurate reporter. It is not stated, but the fact is, that an annual payment was reserved in respect of the easement.

pleaded, and indeed the interest claimed being not in the nature of a license, but of an estate, or at least an easement in the land, which cannot be acquired without writing or prescription, or such a possession or use as furnishes presumption of a grant: neither of which was averred in the plea. "A license," said the Chief Justice, "is technically an authority given to do some one act, or a series of acts on the land of another, without passing any estate in the land. Such as a license to hunt in another's land, or to cut down a certain number of trees. These are held to be revocable when executory, unless a definite term is fixed, but irrevocable when executed. See Viner's Abr. tit. License, A. E. D. G. and the authorities therein cited, which have been examined and found to support the positions laid down by the compiler. It is also holden that such licenses to do a particular act, but passing no estate, may be pleaded without deed. But licenses, which in their nature amount to the granting of an estate for ever so short a time, are not good without deed, and are considered as leases, and must always be pleaded as such." Upon the same principles it was held in Pond v. Pond, 14 Mass. R. 403, where the defendant being sued in trespass for cutting down and carrying away trees on a particular close, he set up a license from the plaintiff; and it appeared that partition was made in the probate court according to the agreement of the parties; but not so as to constitute a legal partition; held, that such an agreement was a license to enter and occupy; but the suing of legal process to effect partition would amount to a revocation of the license; and any subsequent trespass would be without justification.

In Jackson v. Buell the point decided was, that where a grantor reserves in his deed of conveyance the right to erect a dam on the bank of a stream of water specified, it was an interest in the land; and that ejectment would lie for it.

laid down, that a grant of a license to stack hay upon land, does not amount to a lease of the land. As the agreement in the present case was only for an easement, and not for an interest in the land, it did not amount to a lease, and consequently it was not within the statute of frauds. Mr. Justice Forster concurred in opinion, that the agreement did not amount to a lease, but he inclined to be of opinion, that the words in the statute, any uncertain interest in land, did extend to this agreement; but Lee and Dennison thought those words related only to interests, which were uncertain as to the time of their duration. After time taken to consider, it was holden, that the agreement was good for the seven years.

The case referred to in Palmer does not seem to bear out the judgment in the above case: the decision turned upon another point; but Montague and Haughton both thought that the interest in that case was such as bound the land in the hands of a subsequent lessee. That case arose before the statute of frauds, and it would require a considerable stretch to make it apply to a case since the statute. No one will deny, that these cases are within the mischief against which the Legislature intended to guard. In Wood and Lake, the plaintiff was to have the sole use of the part of the land upon which he should stack his coals. How is this to be distinguished in substance from an actual demise for seven years? It appears to be in the very teeth of the statute, which extends generally to all (\*)leases, estates or interests. The statute expresses an anxious intention to embrace interests of exery description. How can it be argued, that a license not countermandable, and which confers the sole use of a place on a man, is not an interest within the statute? Upon what principle is it, that the person entitled to such an easement may maintain trespass? This relaxation of the statute holds out a strong temptation to a man in possession of land, under a parol agreement, to commit perjury, in order to ensure to himself a more permanent interest in the land than the statute would permit him to claim, were the real transaction disclosed. The case of Wood v. Lake has, however, been followed in several recent cases.

It has been decided, that if, after a lease has been granted, the landlord makes improvements on the estate, in consideration of an agreement to pay an additional sum per annum, the sum is not rent, and the agreement is collateral to the lease, and may therefore be recovered upon, although by parol(j).

The fourth section of the Act extends as well to interests created  $de\ dovo$  out of an estate, as to subsisting interests. Therefore an agreement for an assignment of a lease will not be binding, unless made in writing(k)(31).

In a case in Lord Raymond(l), Treby, Chief Justice, reported to the other Justices, that it was a question before him at a trial at nisi prius at Guildhall, whether the sale of timber, growing upon the land, ought to be in writing, by the statute of frauds, or might be by parol? And he was of opinion, and gave the rule accordingly, (\*)that it might be by parol, because it was but a bare chattel; and to this opinion Mr. Justice Powell agreed. This decision, however, may be thought to be overruled by

- (j) Hoby v. Roebuck, 2 Marsh. 433.
- (k) Anon. 1 Ventr. 361; see Poultney v. Holmes, 1 Str. 405.
- (1) Anon. 1 Lord Raym. 182. See Hob. 173; 1 Atk. 175.

<sup>(31)</sup> Where a person writes his signature, and affixes his seal on the back of a lease it is not an assignment of the lease: And although it be agreed between the assignor and assignee, that J. S. should fill up the assignment over the signature and he does so, the case is still within the statute of frauds. Jackson v. Titus, 2 Johns. Rep. 430.

But an assignment of a lease, in writing, though not under seal, is effectual. Holliday v. Marshal, 7 Johns. Rep. 211.

the late case of Crosby v. Wadsworth(m), where a sale of a standing crop of mowing grass then growing was held to be within the statute(32).

The distinction between them appears to be, that in this case, the exclusive right to the vesture of the land was conferred during a limited period, whilst, in the former case, a mere right of entry to cut and carry away the trees would have been held to pass. Indeed, it does not appear by whom the trees were to be felled and carried away.

In the very recent case of Smith v. Surman(n), the agreement was to sell trees standing as timber, at so much a foot. The proprietor had given orders to cut them down, and the purchaser bought them after two of them had been actually felled. It was held that this was not a contract within the fourth section, but a contract for the purchase of the trees when they should be cut down and severed from the freehold.

In Parker v. Staniland, the Court expressed its disinclination to extend the case of Crosby v. Wadsworth,
which one learned Judge referred to the circumstance,
that the grass was growing, and therefore the purchaser
had an intermediate interest in the land while the crops
were growing to maturity, before they were gathered.
Therefore a sale of potatoes in the ground, and which had
never been severed, at so much a sack, to be taken away
immediately, was held not to be within the statute; because the contract was confined to the sale of potatoes,
(\*) and nothing else was in the contemplation of the parties.
They were to be taken immediately, and it was quite ac-

<sup>(</sup>m) 6 East, 602, et supra; Waddington v. Bristow, 2 Bos. & Pull. 452; and see 2 Taunt. 41, per Mansfield, C. J.

<sup>(</sup>n) 9 Barn. & Cress. 561; S. C. 4 Man. & R. 455.

<sup>(32)</sup> See Newcomb v. Ramar, 2 Johns. Rep. 421. in nota.

cidental if they derived any further advantage from being in the land. The purchaser had only an accommodation, and no interest in the soil. The land was considered as a mere warehouse for the potatoes (o).

In a case decided in the same term in the Common Pleas, where growing turnips were sold, but no particular time was stated for their removal, nor did it appear what the degree of their maturity was, the Court, without adverting to these circumstances, held it to be a sale of an interest in land within the statute (p). It must be admitted to be very difficult to distinguish the cases (33).

- (o) Parker v. Staniland, 11 East, 365.
- (p) Emerson v. Heelis, 2 Taunt. 38; see 5 Barn. & Cress. 833.

So, a sale of land by town officers, without deed, is within the statute of frauds. Jackson v. Bull, 2 Caines' Cas. in Error, 301. S. C. 1 Johns. Cas. 81. See Thomas v. Trustees, &c. 3 Marsh. 299.

So, a contract for the sale of pews in a house for public worship, is within the statute. Freeport v. Bartol, 3 Greenl. 340. An agreement by parol to modify a former agreement respecting an interest in lands, is void: As, where A. leased certain lands to B. and it was afterwards agreed, by parol, that B. should not use the pasture land without paying for it, it was held, that this agreement was within the statute of frauds. Togon v. Mooney, 9 Johns. Rep. 358. So, an agreement to extend the time for the performance of a contract in writing for the conveyance of land, is within the statute. Hasbrouck v. Tappen, 15 Johns. Rep. 200.

Possession is an interest in land, within the statute; and a contract for the sale and delivery of the possession of land and the improvements thereon, must be in writing. Howard v. Easton, 7 Johns. Rep. 205. But a parol agreement to pay for improvements made on land, is not within the provisions of the statute. Benedict v. Beebe, 11 Johns. Rep. 145. See Frear v. Hardenburg, 5 Johns. Rep. 272.

So, an agreement for the exchange of lands is within the statute, and must be in writing. Rice v. Peet, 15 Johns. Rep. 503.

<sup>(33)</sup> It may be proper to notice in this place, that no title will pass to a purchaser of real estate, under a sheriff's sale, without a deed or note in writing. Simonds v. Catlin, 2 Caines' Rep. 61. Jackson v. Catlin, 2 Johns. Rep. 248.

In a still later case (q), where potatoes stated to be then growing on three acres and a half of land, were sold by parol, at the rate of 25l. per acre, to be dug and carried away by the purchaser, but no time was appointed for that purpose, it was decided that the contract was not within the statute. Lord Ellenborough said, that if this had been a contract conferring an exclusive right to the land for a time, for the purpose of making a profit of the growing surface, it would be a contract for sale of an interest in or concerning lands, and would then fall unquestionably within the range of Crosby v. Wadsworth. But here is a contract for sale of potatoes at so much per acre; the potatoes are the subject-matter of sale, and whether at the time of sale they were covered with earth in a field or in a box, still it was a sale of a mere chattel: it falls, therefore, within the case of Parker v. Staniland, and that disposes of the point on the statute of frauds.

(\*)In the later case of Evans v. Roberts(r), a parol agreement to purchase a cover of potatoes, to be turned up by the seller was held not to be within the fourth

An agreement made by the owner of land with certain commissioners, by which they were allowed to use the banks of a river, in removing obstructions, and in deepening and widening the river, and to use, occupy and enjoy the same, for which they were to pay a compensation to the owner, who agreed to allow them to cut a canal through his land, is a contract concerning an interest in land, and must be in writing. Phillips v. Thompson, 1-Johns. Ch. Rep. 131.

A relinquishment of an equity of redemption cannot be proved by parol. Scott v. M'Farland, 13 Mass. Rep. 309.

An agreement between the purchaser of land, and a third person that he should be admitted as a partner in the purchase, within the statute. Henderson v. Hudson, 1 Munf. 510. But see Bunnell v. Taintors' Admr. 4 Conn. Rep. 568. See also, Parker v. Bodley, 4 Bibb, 102.

<sup>(</sup>q) Warwick v. Bruce, 2 Mau. & Selw. 205; and see Mayfield v. Wadsley, 3 Barn. & Cress. 357; S. C. 5 Dowl. & R. 224.

<sup>(</sup>r) 5 Barn. & Cress. 829; S. C. 8 Dowl. & R. 611.

section, although the crop was in a growing state at the time of the sale. It was held, that a sale of the produce of the land, whether it be in a state of maturity or not, provided it be in actual existence at the time of the contract, is not a sale of any interest within the fourth section. The determination of the Courts to escape from the rule in Crosby v. Wadsworth, without overruling that case, renders it somewhat difficult to apply the law to individual cases; but the rule in Evans v. Roberts may safely be considered one of general application (34).

If an entire agreement be made for the sale of real and personal estate, and the agreement as to the land be within the statute, and void, it cannot be supported as to the personal property which was sold with it(s)(35).

(s) Cooke v. Tombs, 2 Anst. 420; Lea v. Barber, ib. 425, cited. See Chater v. Beckett, 8 Term Rep. 201; and see Neal v. Viney, 1 Camp. Ca. 471; Corder v. Drakeford, 3 Taunt. 382; Mayfield v. Wadsley, 3 Barn. & Cress. 357; S. C. 5 Dowl. & R. 224.

As to agreements between adjoining proprietors of land, relating to boundaries, See Boyd's Les. v. Graves, 4 Wheat. 513. Jackson v. Dyeting, 2 Caines' Rep. 198. Stuyvesant v. Tompkins, 9 Johns. Rep. 61.

An agreement to remove a fence for the purpose of widening a certain road, not within the statute. Storms v. Snyder, 10 Johns. Rep. 109.

The statute does not apply to promises raised by implication of law. Allen v. Pryor, 3 Marsh. Ken. Rep. 306. See Bliss v. Thompson, 4 Mass. Rep. 488. See Fischli v. Dumaresly, 3 Marsh. Ken. Rep. 23. Goodwin v. Gilbert, 9 Mass. Rep. 510.

<sup>(34)</sup> A contract for the sale of things annexed to the freehold, but which may be separated without violence, or injury, and which, by the terms of the contract, are to be separated, is not within the statute of frauds. Bostwick v. Leach, 3 Day, 476. Nor is an agreement not to exercise a right regarding the freehold, as the right of using a mill, &c. within the statute. Ib. So, also, it seems, that contracts for the sale of gravel, stones, timber trees, and the boards and bricks of a house to be pulled down and carried away, are not within the statute. The statute contemplates a transfer of lands, or some interest in them. Ib.

<sup>(35)</sup> See Crawford v. Morrell, 8 Johns. Rep. 2d edit. (\*84)

## SECTION II.

Of the form and Signature of the Agreement.

We may now consider, first, what is a sufficient agreement; 2dly, what is a sufficient signature by the party or his agent; and 3dly, who will be deemed an agent lawfully authorized. And,

First then, it is to be observed, that the statute requires the writing to be signed only by the person to be charged; and therefore, if a bill be brought against a (\*)person who signed an agreement, he will be bound by it, although the other party did not sign it, as the agreement is signed by the person to be charged(t). This point has been established by the concurrent authority of the Lord Keeper North, Lord Keeper Wright, Lord Chancellor Hardwicke, Lord C. B. Smith, and Bathurst and Aston, Justices, when Lords Commissioners, Lord Chancellor Thurlow, Lord Chancellor Eldon, and Sir Wm. Grant. The legislature has expressly said, that the agreement shall be binding if signed by the party to be charged;

<sup>(</sup>t) Hatton v. Gray, 2 Ch. Ca. 164; Cotton v. Lee, 2 Bro. C. C. 564; Coleman v. Upcot, 5 Vin. Abr. 527. pl. 17; Buckhouse v. Crossby, 2 Eq. Ca. Abr. 32, pl. 44; Seton v. Slade, 7 Ves. jun. 265; Fowle v. Freeman, MS.; 9 Ves. jun. 355, S. C. See 1 Scho. & Lef. 20; and 11 Ves. jun. 592; Western v. Russell, 3 Ves. & Bea. 187; and see Wain v. Warlters, 5 East, 10; Egerton v. Matthews, 6 East, 307, which do not impeach this doctrine: see particularly 5 East, 16; and Allen v. Bennet, 3 Taunt. 169. As to Wain v. Warlters, see Stadt v. Lill, 9 East, 348; 1 Camp. Ca. 242; Ex parte Minet, 14 Ves. jun. 189; Ex parte Gardom, 15 Ves. jun. 286; Bateman v. Philips, 15 East, 272; Saunders v. Wakefield, 4 Barn. & Ald. 595; Jenkins v. Reynolds, 3 Brod. & Bing. 14; S. C. 6 Man. 86.

and as Lord Hardwicke has observed, the word party in the statute is not to be construed party as to a deed, but person in general(u); but there have been instances in which the want of the signature to the agreement by the party seeking to enforce it, has been deemed a badge of fraud(v); but, perhaps, the transaction ought not to be viewed in that light, unless the other party called on the party who had not signed to execute it, in which case a refusal to sign might be held to operate as a repudiation of the contract(w)(I)(36).

(\*) In a late case, Lord C. J. Mansfield observed, that in equity a contract signed by one party would be enforced, and it was not clear that it was different at law(x). The rule in equity, it is conceived, is founded simply on the words of the statute, which must be equally binding on the courts of law. There is not an objection which can be made to the rule as applicable to an action at law which will not apply with equal force to a suit in equity. In a later case, accordingly, upon the 17th section, the same learned Judge observed, that every one knows it is the

<sup>(</sup>u) See 3 Atk. 503.

<sup>(</sup>v) See O'Rouke r. Percival, 2 Ball & Beatty, 58.

<sup>(</sup>w) See 2 Ball & Beatty, 371; and Martin v. Mitchell, 3 Swanst. 428.

<sup>(</sup>x) Bowen v. Morris, 2 Taunt. 374.

<sup>(</sup>I) The author's anxiety to place the law upon a safer footing, induced him to bring in a bill to amend the statute of frauds. He had not an opportunity of pressing it through the House of Commons; but as such things are not accessible, and the law will no doubt be altered, it has been thought right to print the bill in the Appendix, No. 11.

<sup>(36)</sup> See Bartstow v. Gray, 3 Greenl. Rep. 409. Ballard v. Walker, 3 Johns. Cas. 60. Roget v. Merritt, 2 Caines' Rep. 117. Douglass v. Spears, 2 Nott & M'Cord, 207. Cosack v. Descoudres, 1 M'Cord, 425. Clason v. Bailey, 14 Johns. Rep. 484. Penniman v. Hartshorn, 13 Mass. Rep. 87.

daily practice of the Court of Chancery to establish contracts signed by one person only, and yet a court of equity can no more dispense with the statute of frauds than a court of law can(y). Lord Eldon has observed, that equity has not upon these points gone further than courts of law: what is the construction of the statute, what within the legal intent of it will amount to a signing, being the same questions in equity as at law. Upon that point, equity professing to follow the law, if a new question should arise, his Lordship said, that he would rather send a case to a court of law(z). In a still later case at nisi prius, where the purchaser only had signed, Lord Tenterden said that it was the duty of the auctioneer to sign, and he had often had occasion to lament they do not do so. What a court of equity would do in the case he could not possibly say. He declined deciding the point according to his opinion, as the counsel would not undertake to carry the same forward on a bill of exceptions(a).

(\*)But although the agreement must be signed, yet it need not be so averred in a bill for a specific performance; for the writing, unless signed, would not be an agreement, and as the allegation in the bill of course is that there is an agreement in writing, signature must be presumed until the contrary is shown(b)(37).

If a written agreement has been in a part executed, it seems that an agreement subsequently entered into between the parties, and reduced into writing, will bind them both, if signed by one of them (c).

A receipt for the purchase-money may constitute an

- (y) Allen v. Bennett, 3 Taunt. 176.
- (z) 18 Ves. jun. 183.
- (a) Wheeler v. Collier, 1 Mood. & Mal. 123.
- (b) Rist v. Hobson, 1 Sim. & Stu. 543.
- (c) Owen v. Davies, 1 Ves. 82.

agreement in writing within the statute(d); and it has frequently been decided, that a note or letter will be a sufficient agreement to take a case out of the statute(e)(38); but every agreement must be stamped before it can be read(f); and, as this ought to be done, the Court will permit the cause to stand over to get the agreement stamped, and will assist either party in obtaining it for that purpose.

Thus, in Fowle v. Freeman(g), the agreement was sent by the vendor to his attorney, with a letter written at the bottom, directing him to prepare a technical agreement. The vendor afterwards refused to perform the contract, and the attorney would not deliver the agreement to the purchaser for the purpose of getting it stamped, contending that it was a private letter to him; but the Court, (\*) on motion, ordered it to be delivered to the purchaser for that purpose.

<sup>(</sup>d) Coles v. Trecothick, 9 Ves. jun. 234; Blagden v. Bradbear, 12 Ves. jun. 466.

<sup>(</sup>e) Coleman v. Upcot, 5 Vin. Abr. 527, pl. 17; Buckhouse v. Crossby, 2 Eq. Ca. Abr. 32, pl. 44.

<sup>(</sup>f) Ford v. Compton; Hearne v. James, 2 Bro. C. C. 32, 309.

<sup>(</sup>g) Rolls, March 8, 1804. MS. 9 Ves. jun. 351, S. C. but not reported as to this point. See *infra*, ch. 4. s. 3; Clarke v. Terrel, 1 Smith's Rep. 399; Coles v. Trecothick, 9 Ves. jun. 234.

<sup>(38)</sup> In South Carolina, it has been decided that a receipt signed by the vendor, in these words, "Received of A. 20 dollars, being on account of a plantation on the Cypress, sold to him this day for 2,200 dollars, payable in different instalments, as per agreement. Charleston, August 1, 1816, was sufficient to take the case out of the statute of frauds. Cosack v. Descoudres, 1 McCord, 425.

Where an agent had agreed, by parol, to bid for his principal, at a sheriff's sale, for certain real estate, and who took the titles in his own name, the case will be taken out of the statute of frauds, by an account made out and signed by him, charging his principal with the purchasemoney; in which case, the agent was decreed to hold the estate in trust. Denton v. M'Kenzie, 1 Des. 289.

But if the agreement is admitted by the answer, so as to dispense with the necessity of proving it, the office-copy of the bill, or, if the defendant refuse to produce it, the record itself, may be read in support of the plaintiff's case, and need not be stamped, nor can the fact of the agreement not being stamped be taken advantage of (h).

If, upon a treaty for sale of an estate, the owner write a letter to the person wishing to buy it, stating, that if he parts with the estate it shall be on such and such terms (specifying them); and such person, upon receipt of the letter, or within a reasonable time after the offer is made(i), accept the terms mentioned in it, the owner will be compelled to perform the contract in specie(j)(39).

So if a man (being in company) make offers of a bargain, and then write them down and sign them; and another person take them up and prefer his bill, that will be a sufficient agreement to take the case out of the statute(k).

But if it appear that, on being submitted to any person for acceptance, he had hastily snatched it up, had refused the owner a copy of it; or if, from other circumstances, fraud in procuring it may be inferred, in case of an action, it will be left to the jury to say whether it was intended by the defendant, at first, to be a valid agreement on his part, or as only containing proposals in writing,

- (h) Huddleston v. Briscoe, 11 Ves. jun. 583.
- (i) See 3 Mer. 454.
- (j) Coleman v. Upcot, 5 Vin. Abr. 527, pl. 87. See Gaskarth v. Lord Lowther, 12 Ves. jun. 107.
  - (k) S. C. per Lord Chancellor.

<sup>(39)</sup> An offer of a bargain, by one person to another, imposes no obligation on the former, until it is accepted by the latter, according to the terms of the offer. Any qualification of those terms invalidates the offer, without the assent of him who made it. Eliason v. Henshaw, 4 Wheat. 225, 228.

subject to future revision(l): and if the aid of equity be sought, these circumstances would have equal weight (\*) with the Court. So in every case it must be consider ed, whether the note or correspondence import a concluded agreement: if it amount merely to treaty, it will not sustain an action or suit(m)(40).

The letters will not constitute an agreement unless the answer to the offer is a simple acceptance, without the introduction of any new term(n).

And although a given time be named in the offer for the acceptance of it, yet it may be retracted at any time before it is actually accepted(o).

And where a letter or other writing do not in itself evidence all the terms of the engagement by which the person signing it consents to be bound, but it requires from the other party not a simple assent to the terms stated, but a special acceptance which is to supply a farther term of the agreement; there it is obvious that such special acceptance must be expressed in writing, for otherwise the whole agreement will not be in writing, within the statute of frauds (p).

The note or writing must specify the terms of the agreement, for otherwise all the danger of perjury which the statute intended to guard against would be let in (41).

- (1) See Knight v. Crockford, 1 Esp. Ca. 189.
- (m) Huddleston v. Briscoe, 11 Ves. jun. 583; Stratford v. Bosworth, 2 Ves. & Bea. 341; Ogilvie v. Foljambe, 3 Mer. 53.
- (n) Holland v. Eyre, 2 Sim. & Stu. 194; Routledge v. Grant, 4 Bing. 653; 1 Moore & Payne, 717; Smith v. Surman, 9 Barn. & Cress. 561.
  - (o) Routledge v. Grant, ubi sup.
  - (p) Boys v. Ayerst, 6 Madd. 316.

<sup>(40)</sup> See Hobby v. Finch, Kirby, 14.

<sup>(41)</sup>  $\Lambda$  writing acknowledging the reception of a sum of money, being the cash part of the consideration of a sale of land to the plaintiff, (\*89)

Thus, upon the sale of nine houses which were in mortgage, the vendor wrote a letter to the mortgagee to this effect: "Mr. Leonard, pray deliver my writings to the bearer, I having disposed of them. Am, &c." The vendor afterwards refused to perform the contract, and pleaded the statute of frauds to a bill filed by the purchaser for a specific performance, and the plea was (\*)allowed; because it ought to be such an agreement as specified the terms thereof, which this did not, though it was signed by the party; for this mentioned not the sum that was to be paid, nor the number of houses that were to be disposed of; whether all, or some, or how many; nor to whom they were to be disposed of in neither did this letter mention whether they were disposed of by way of sale or assignment of lease(q): but where the

(q) Seagood v. Meale, Prec. Cha. 560; Rose v. Cunynghame, 11 Ves. jun. 550; Card v. Jaffray, 2 Scho. & Lef. 374; Lord Ormond v. Anderson, 2 Ball & Beat. 363; and see Champion v. Plummer, 1 New Rep. 252; Hinde v. Whitehouse, 7 East, 558; Cooper v. Smith, 15 East, 103; Richards v. Porter, 6 Barn. & Cress. 437; S. C. 9 Dowl. & R. 497; all four cases on the 17th section.

without saying more, is not such a memorandum as will take the case out of the statute of frauds. Ellis v. Deadman, 4 Bibb, 466.

A memorandum of the sale of land, to be effectual, must not only be signed by the party to be charged, but must contain the substantial terms of the contract, expressed with such certainty that they may be understood from the contract itself, or some other writing to which it refers, without resorting to parol evidence. Parkhurst v. Van Cortlandt, 1 Johns. Ch. Rep. 273. S. C. on appeal, 14 Johns. Rep. 15. See Abeel v. Radcliff, 13 Johns. Rep. 297. Givens v. Calder, 2 Des. 188. Parker v. Bodley, 4 Bibb, 102. Colson v. Thompson, 2 Wheat. 336, 341.

In Virginia, it has been decided, that a letter containing a promise to make a deed of a tract of land, "according to contract," is a sufficient memorandum, under the statute of frauds, notwithstanding the terms of the contract are not mentioned; provided the party claiming the conveyance, can prove by the testimony of one witness, the price which was agreed to be paid for the land. Johnson v. Ronald's Admr. 4 Munf. 77.

property is described generally as "Mr. O.'s house," parol evidence has always been admitted to show to what house the treaty related (r).

So where(s), upon a parol agreement, the vendor sent a letter to the purchaser, informing him that, at the time he contracted for the sale of the estate, the value of the timber was not known to him, and that he (the purchaser) should not have the estate, unless he would give a larger price; Lord Hardwicke held, that the letter could not be sufficient evidence of the agreement, the terms of it not being mentioned in the agreement itself.

So in a recent case, where an auctioneer's receipt for the deposit was attempted to be set up as an agreement, the Master of the Rolls rejected it, because it did not state the price to be paid for the estate; and it could not be collected from the amount of the deposit, as it did not appear what proportion it bore to the price(t).

And here we may notice a case where an agreement was (\*) executed which referred to certain covenants, which had been read, contained in a described paper, which, in fact, contained the terms of the agreement. It appeared that all the covenants contained in that paper had not been read; and which of them had been read, and which had not, was the difficulty, which could only be solved by parol testimony; and Mr. Justice Buller held clearly, that such evidence was inadmissible(u), as it would introduce all the mischiefs, inconvenience, and uncertainty the statute was designed to prevent; and Lord Redesdale has since unqualifiedly approved of this decision(w).

(r) Ogilvie v. Foljambe, 3 Mer. 53.

<sup>(</sup>s) Clerk v. Wright, 1 Atk. 12; and see Clinan v. Cooke, 1 Scho. & Lef. 22.

<sup>(</sup>t) Blagden v. Bradbear, 12 Ves. jun. 466; see Elmore v. Kingscote, 5 Barn. & Cress. 583; S. C. 8 Dowl. & R. 343.

<sup>(</sup>u) Erodie v. St. Paul, 1 Ves. jun. 326; Higginson v. Clowes, 15 Ves. jun. 516; Lindsay v. Lynch, 3 Sch. & Lef. 1.

<sup>(</sup>w) 1 Sch. & Lef. 38; and see O'Herlihy r. Hedges, ibid. 123. (\*91)

Neither will a performance be compelled on a note or letter, if any error or omission, however trifling, appear in the essential terms of the agreement.

Thus in a case(x) (I) before Lord Hardwicke, the bill was brought to have a specific performance of an agreement, from letters which had passed between the parties. It appeared, that a certain number of years purchase was to be given for the land, but it could not be ascertained whether the rents upon a few cow-gates were (\*)5s. or 1s.; and although there was no other doubt, Lord Hardwicke held, that such an agreement could not be carried into execution. He said, that in these cases it ought to be considered, whether at law the party could recover damages; for if he could not, the Court ought not to carry such agreements into execution.

The late Lord C. J. Mansfield observed, that there had been many cases in Chancery, some of which he thought had been carried too far, where the Court had picked out a contract from letters, in which the parties never certainly contemplated that a complete contract was contained (y).

<sup>(</sup>x) Lord Middleton v. Wilson, et e contra, Chan. 1741, MS.; S. C. Lofft, 801, cited. See 9 Ves. jun. 252; Stokes v. Moore, 1 Cox, 219; Popham v. Eyre, Lofft, 786; Gordon v. Trevalyan, 1 Price, 64; Blore v. Sutton, 3 Mer. 237.

<sup>(</sup>y) 3 Taunt. 172.

<sup>(</sup>I) The case is in Reg. Lib. 1741, fo. 260, by the name of Lord Middleton v. Eyre. The estate was sold by an agent to Dr. Wilson, by parol, and the parties appear to have bound themselves by letters, the particulars of which do not appear in the Register's book. The parties beneficially interested afterwards sold the estate for a greater price to Lord Middleton, who filed a bill for a specific peformance of the agreement, and Dr. Wilson filed a cross-bill. The cross-bill was dismissed with costs, and in the original cause a specific performance was decreed. The point in the text is not stated in the Registrar's book.

But although a letter do not in itself contain the whole agreement, yet if it actually refer to a writing that does, that will be sufficient, although such writing is not signed (43).

Thus in a case where an estate was advertised to be let for three lives, or thirty-one years, and an agreement was entered into for a lease, in which the term for which it was to be granted was omitted; Lord Redesdale held, that if the agreement had referred to the advertisement, parol evidence might have been admitted to show what was the thing (namely the advertisement) so referred to, for then it would be an agreement to grant for so much time as was expressed in the advertisement; and then the identity of the advertisement might be proved by parol evidence (z)(44). And Sir William Grant, in a late case, expressed his opinion, that a receipt which did not contain the terms of the agreement, might have been enforced as an agreement, had it referred to the conditions of sale, (\*) which would have entitled the Court to look at them for the terms(a).

So an agreement not containing the name of the buyer may be made out by connecting it with a letter from the buyer on the subject(b).

- (z) See Clinan v. Cooke, 1 Scho. & Lef. 22; and see Cass v. Waterhouse, Prec. Cha. 29; Hinde v. Whitehouse, 7 East, 558; Feoffees of Heriot's Hospital v. Gibson, 2 Dow, 301; Powell v. Dillon, 2 Ball & Beat. 416.
- (a) Blagden v. Bradbear, 12 Ves. jun. 466; and see Shippey v. Derrison, 5 Esp. Ca. 190; Hinde v. Whitehouse, 7 East, 558; Kenworthy v. Schofield, 2 Barn. & Cress. 945; S. C. 4 Dowl. & R. 556; 1 Turn. & Russ. 352.
- (b) Allen v. Bennet, 3 Taunt. 169; Western v. Russell, 3 Ves. & Bea. 187.

(\*93)

<sup>(43)</sup> A reference in a deed, to a will, not executed pursuant to statute, will have the effect of incorporating it with, and making it a part of the deed. Igard v. Montgomery, 1 Nott & M'Cord, 381.

<sup>(44)</sup> See Johnson v. Donald's Admr. 4 Munf. 77.

In a case(c) where an agreement for sale was reduced into writing, but not signed, owing to the vendor having failed in an appointment for that purpose; the vendee's agent wrote to urge the signing of the agreement; and the vendor wrote in answer a letter, in which, after stating his having been from home, he said, "his word should always be as good as any security he could 'give." And this was held by Lord Thurlow to take the case out of the statute, as clearly referring to the written instrument. The ground of this decision was, that the vendor had agreed, by writing, to sign the agreement. If he had said he never would sign it, he could not have been bound; but if he said he never would sign it, but would make it as good as if he did, it would be a promise to perform it; if he said he would never sign it, because he would not hamper himself by an agreement, it would be too perverse to be admitted(d). It appears that Lord Thurlow was diffident of his opinion in this case; and Lord Redesdale has declared, that he had often discussed the case, and he could never bring his mind to agree with Lord Thurlow's decision, because he (Lord Redesdale) thought the true meaning of the agreement (\*)was, "I will not bind myself, but you shall rely on my word(e)."

But in these cases there must be a clear reference to the particular paper, so as to prevent the possibility of one paper being substituted for another (f).

And if the agreement is defective, and the letter refers to a different contract from that proved by the opposite

<sup>(</sup>c) Tawney v. Crowther, 3 Bro. C. C. 161, 318; and see Forster v. Hale, 3 Ves. jun. 696; Cooke v. Tombs, 2 Anstr. 420; Saunderson v. Jackson, 2 Bos. & Pull. 238; and 9 Ves. jun. 250.

<sup>(</sup>d) Per Lord Thurlow, 3 Bro. C. C. 320.

<sup>(</sup>e) See 1 Scho. & Lef. 34; and see Tanner v. Smart, 6 Barn. & Cress. 603; S. C. 9 Dowl. & R. 549.

<sup>(</sup>f) Boydell v. Drummond, 11 East, 142.

party, the letter cannot be adduced as evidence of the contract set up. The letter must be taken altogether, and if it falsify the contract proved by the parol testimony, it will not take the case out of the statute(g).

As we shall hereafter see, an auctioneer is an agent lawfully authorized for the vendor and purchaser within the statute. Upon the sale of estates by auction, a deposit is almost universally paid, for which the auctioneer gives a receipt, referring to the particulars, or indorsed on them, and amounting, in most cases, to a valid agreement on the part of the vendor within the statute(h). And it seems that a bill of sale, or entry by the auctioneer, of the account of the sale, in his books, stating the name of the owner, the person to whom the estate is sold, and the price it fetched, would be deemed a sufficient memorandum of the agreement to satisfy the statute(i). This, however, it clearly would not, unless it either contained the conditions of the sale and the particulars of the property, or actually referred to them, so as to enable the Court to look at them (i)(45).

(\*)A note or letter, written by the vendor to any third person, containing directions to carry the agreement into execution, will, subject to the before-mentioned rules, be

(g) Cooper v. Smith, 15 East, 103.

(h) See Blagden v. Bradbear, 12 Ves. jun. 466, et supra.

(i) See Emmerson v. Heelis, 2 Taunt. 33, et infra; but see Mussell v. Cooke, Prec. Cha. 533; Charlewood v. Duke of Bedford, 1 Atk. 497; Ramsbottom v. Mortley, 2 Mau. & Selw. 445.

(j) Blagden v. Bradbear, ubi sup. Hinde v. Whitehouse, 7 East, 558; Kenworthy v. Schofield, 2 Barn. & Cress. 945; S. C. 4 Dowl. & R. 556.

<sup>(45)</sup> See Clason v. Bailey, 14 Johns. Rep. 490. Davis v. Robertson, 1 Rep. Con. Ct. 71.

The original memorandum made by the auctioneer must be produced on the trial, if in existence; a copy will not be received as evidence. Ib.

<sup>(\*95)</sup> 

a sufficient agreement to take a case out of the statute (k). This was laid down by Lord Hardwicke, who said, that it had been deemed to be a signing within the statute, and agreeable to the provision of it. And the point was expressly determined, in the year 1719, by the Court of Exchequer (l).—Upon an agreement for an assignment of a lease, the owner sent a letter, specifying the agreement, to a scrivener, with directions to draw an assignment pursuant to the agreement; and Chief Baron Bury, Baron Price, and Baron Page, were of opinion, that the letter was a writing within the statute of frauds. And the same doctrine appears to apply to a letter written by a purchaser (m).

In Kennedy v. Lee(n), Lord Eldon observed, that in order to form a contract by letter, he apprehended nothing more was necessary than this, that when one man makes an offer to another to sell for so much, and the other closes with the terms of his offer, there must be a fair understanding on the part of each as to what is to be the purchase-money, and how it is to be paid, and also a reasonable description of the subject of the bargain. It must be understood, however, that the party seeking the specific performance of such an agreement, is bound to find in the correspondence, not merely a treaty, still less a proposal for an agreement, but a treaty with reference to which, mutual consent can be clearly demonstrated, or a proposal met by that sort of acceptance, which makes it (\*)no longer the act of one party but of both. It follows, that he is bound to point out to the Court, upon the face of the correspondence, a clear description of the subjectmatter relative to which the contract was in fact made and

<sup>(</sup>k) Welford v. Beazely, 3 Atk. 503. See Seagood v. Meale, Prec. Cha. 560; Cooke v. Tombs, 2 Anstr. 420.

<sup>(1)</sup> Smith v. Watson, Bunb. 55; S. C. MS.

<sup>(</sup>m) Rose v. Cunynghame, 11 Ves. jun. 550.

<sup>(</sup>n) 3 Mer. 441; and see Ogilvie v. Foljambe, 3 Mer. 53.

entered into. His Lordship added, that he did not mean (because the cases which had been decided would not bear him out in going so far) that he was to see that both parties really meant the same precise thing, but only that both actually gave their assent to that proposition, which, be it what it may, de facto arises out of the terms of the correspondence. The same construction must be put upon a letter, or a series of letters, that would be applied to the case of a formal instrument; the only difference between them being, that a letter or correspondence is generally more loose and inaccurate in respect of terms, and creates a greater difficulty in arriving at a precise conclusion.

In Cooth v. Jackson(o), Lord Rosslyn put the case of a bond of reference to a surveyor, the price to depend upon his valuation, only to ascertain how much an acre the purchaser was to pay for the land. And his Lordship said, he should conceive that not to be within the statute.

But rent-rolls, particulars of estates, abstracts, &c. delivered by the vendor on the treaty for sale, will not be considered as an agreement, although signed by him, and containing the particulars of the agreement; nor will letters written, or representations made by him, to creditors, concerning the sale, receive that construction.

Thus, in a case (p) where A agreed by parol with B for the purchase of lands; shortly afterwards, a rent-roll was delivered to A, which B dated and altered in his own hand-writing; and it was intituled, "Land agreed (\*) to be sold by B to A, from, &c. at twenty-one years purchase, for the clear yearly rent." An abstract of the title, also, stating the contract, was delivered by A's agent, and also further particulars and papers at different times. B also wrote to several of his creditors, informing them that

<sup>(</sup>o) 6 Ves. jun. 17.

<sup>(</sup>p) Whaley v. Bagenel, 6 Bro. P. C. 5.

<sup>(\*97)</sup> 

he had agreed with A. for the sale of the estate, at twentyone years purchase; referred tenants to A. as owner of
the estate; and set up the contract as a bar to an elegit.
B. afterwards refused to perform the agreement; and to
a bill filed for a specific performance, pleaded the statute
of frauds, and the plea was allowed.

So, in a later case(q), upon a bill filed by a vendee, for a specific performance of a parol agreement for sale of lands, it appeared that the vendor gave the purchaser a particular of the property to be sold, with the terms and conditions, all in his own hand-writing, and signed by him; and it was afterwards delivered, by agreement of both parties to an attorney, to prepare the conveyance from, who prepared a draft, and brought it to the parties, and they read over and approved of it, and agreed to execute the same, whenever a fair copy could be written out. The defendant, however, refused to fulfil his part of the agreement, and pleaded the statute of frauds to the bill; and, as the particular was delivered at the outset of the treaty, no agreement being then made, the Court held it could only be delivered as a list or catalogue of the matters for sale, to enable the purchaser to form a proper estimate of their value; that the signing the particular could have no other effect than to give it authenticity, as a true list of the items then offered for sale; and that the subsequent acts could not affect the original nature of the particular, and turn it into an agreement.

(\*)Although an agreement be reduced into writing by

<sup>(</sup>q) Cook v. Tombs, 2 Anst. 420; and see Cass v. Waterhouse, Prec. Cha. 29.

a person present at the making of it, yet if the parties do not sign it, they will not be bound by it(r)(46).

If an agreement contain all the terms, the sending of it, as instructions to a person to prepare a proper agreement, will not be deemed an intention to extend the agreement, but merely to reduce it into technical lan-

guage.

Thus, in Fowle v. Freeman(s), after some treaty for the purchase of an estate, certain terms were agreed upon and written down by Freeman the vendor, and afterwards written out by him, as an agreement; viz.-"March 12th, 1803. I agree to sell to Mr. Fowle my estate, &c. for the sum of 27,000l. upon the following conditions, &c." [stating them.] Freeman signed this agreement, and read it to Fowle, who approved of it. Freeman then underwrote a letter to his solicitor in town to the following effect :- "Sir, please to prepare a proper agreement for Mr. Fowle and me to sign, and send it to me at this place. You will also deliver to Mr. Everett," (the gentleman who carried the letter to town,) "an abstract of my title-deeds for his examination. As soon as the titledeeds are approved of, he engages to lend me 5,000l. till Michaelmas next." The letter was signed and dated by him, and was delivered by Mr. Everett to the solicitor in

<sup>(</sup>r) Gunter v. Halsey, Ambl. 586; Whitchurch v. Bevis, 2 Bro. C.
C. 559; Ramsbottom v. Tunbridge, Ramsbottom v. Mortley, 2 Mau. & Selw. 434. 445.

<sup>(</sup>s) Rolls, 8th March, 1801, MS.; 9 Ves. Jun. 351, S. C.

<sup>(46)</sup> A parol agreement for the sale of land will not be decreed specifically, though the vendor had given instructions, in writing, stating the terms, to an attorney, to draw the deeds; and though the deeds were drawn in pursuance of such instructions, and the vendor took them home and wrote to the vendee, informing her that they were ready, and requested her to attend and settle the business, but died before the parties met. Givens v. Calder, 2 Des. 171.

town. Freeman afterwards refused to perform the agreement; and, to a bill filed by Fowle for a specific performance, pleaded the statute of frauds. The Master of the Rolls held, that if the attorney had prepared an agreement, according to the letter, Freeman would have been compelled to execute it, and the attorney could not alter (\*)the agreement itself in any one respect. A letter or proposal will do, although the party repents; and many decrees have been founded merely on letters. If this objection were to hold, he said, it might be contended, that if an agreement contained a reference to title-deeds to be formally executed, it would not do; and his Hnor decreed a specific performance.

In these cases it should be observed, that letters may be stated in a bill as constituting the alleged agreement, or as evidence of an alleged parol agreement. In the first case, the defendant may insist that they do not make out a concluded agreement, and no extrinsic evidence can be received; in the latter he may plead the statute of frauds(t).

II. We are next to consider what is a sufficient signature by the party or his agent. Before the statute of frauds, an agreement, although reduced into writing and signed, was not considered as a written agreement unless sealed; but it was regarded \*as a parol agreement, and the writing as evidence of it(u).

It has been justly said that the same rule prevails since the statute of frauds(x); for the law of England recognizes only two kinds of contracts; viz. specialties

<sup>(</sup>t) Birce v. Bletchley, 6 Madd. 17.

<sup>(</sup>u) See 1 Ch. Ca. 85.

<sup>(</sup>x) See Marq. of Normanby v. Duke of Devonshire, 2 Freem. 216.

and parol agreements, which last include all writings not under seal, as well as verbal agreements not reduced into writing (y)(47). In the case of Wheeler v. Newton(z), the agreement not having been sealed, seems to have been insisted upon, as leaving the case within the statute: and (\*)Lord Commissioner Rawlinson said, that agreements in writing, though not sealed, had some better countenance since the statute of frauds and perjuries than they had before (I).

This doubt must have arisen from the common-law doctrine before noticed, that an agreement not under seal is simply a parol agreement, and the writing evidence of it; but there certainly was no foundation for the doubt: the statute makes signing only requisite to the validity of a written agreement, and it is now clearly established, that sealing is not necessary; and if a man be in the habit of printing or stamping instead of writing his name, he would be considered to have signed by his printed name(a)(48).

<sup>(</sup>y) Rann v. Hughes, 7 Term Rep. 350, n.; S. C. MS. in tot. verbis.

<sup>(</sup>z) Prec. Ch. 16.

<sup>(</sup>a) Saunderson v. Jackson, 2 Bos. & Pull. 238; Schneider v. Norris, 2 Mau. & Selw. 286.

<sup>(</sup>I) In Dawson v. Ellis, 1 Jac. & Walk. 524, the Court was of opinion, that if A. contract verbally to sell to B, and afterwards contract by writing to sell to C, and then convey the estate to B, he (B) is not liable to perform the contract with C, although he had notice of it before the conveyance.

<sup>(47)</sup> See Ballard v. Walker, 3 Johns. Cas. 60.

<sup>(48)</sup> An assignment of a lease, by a writing not under seal, is valid. Holliday v. Marshall, 7 Johns. Rep. 211. But a blank assignment of a lease, is inoperative: Thus, if a person write his name and affix his seal on the back of a lease, and at the same time, it is agreed between him and the person to whom the assignment is to be made, that an assignment shall be written by a third person, over the signature and seal, and this is done, and the deed delivered to the assignee, the assignment

The signature required by the statute is to have the effect of giving authenticity to the *whole* instrument; and where the name is inserted in such a manner as to have that effect, it does not much signify in what part of the instrument it is to be found(b)(49).

Therefore, the signing the name at the beginning of the agreement will take it out of the statute; as, if a person write the agreement himself, and begin, "A. B. agrees to sell, &c." and this is only in analogy to the case of a testator writing his name at the beginning of his will, which is equivalent to his signing it; and yet the statute expressly requires a signature (c).

(\*)And such a signature will be sufficient, although a place be left for a signature at the bottom of the instrument(d)(I); and yet, as Lord Eldon has observed, it is im-

(b) Vide Stokes v. Moore, stated infra; Allen v. Bennet, 3 Taunt. 169.

(c) Knight v. Crockford, 1 Esp. Ca. 189; and see 1 Bro. C. C. 410; 3 Esp. Ca. 182; 9 Ves. jun. 248; and Saunderson v. Jackson, 2 Bos. & Pull. 238. See Cooper v. Smith, 15 East, 103; Morison v. Turnour, 18 Ves. jun. 175; Propert v. Parker, 1 Russ. & Ryl. 625.

(d) Saunderson v. Jackson, ubi supra.

(I) This question frequently arises upon wills of personalty. Walker v. Walker, decided by the Court of Delegates, 19th Feb. 1805. Ann Walker made her will, comprising real and personal estate, which she signed and sealed, and then folded up with this indorsement; "I signed and sealed my will to have it ready to be witnessed the first opportunity I could get proper persons for it." The usual attestation clause was added, but not signed by any witness. At her death the instrument was found in her drawer in the envelop, and it was determined not to be a good will of the personal property, on the ground, that something appearing by the attestation clause to be intended to be

is a nullity. Jackson v. Titus, 2 Johns. Rep. 430. See Ulen v. Kittredge, 7 Mass. Rep. 233. Clason v. Bailey, 14 Johns. Rep. 484. Nelson v. Dubois, 13 Johns. Rep. 175.

<sup>(49)</sup> See Argenbright v. Campbell, 3 Hen. & Munf. 144, 198. Penniman v. Hartshorn, 13 Mass. Rep. 87.

possible not to see that the insertion of the name at the beginning was not intended to be a signature, and that the paper was meant to be incomplete till it was further signed.

And if the party know the contents of the agreement, a subscription, as a witness, is a sufficient signing (e).

So, where a clerk of an agent duly authorized to treat for a principal, signed an agreement thus, "Witness A. B. for C. D. agent to the seller," it was holden to be out of the statute(f). And it is sufficient, it seems, if the initials of the name are set down(g).

But a letter without a signature of the name in some way cannot be brought within the statute. Therefore, a letter written by a mother to her son, beginning "My dear Nicholas," and ending "your affectionate mother," (\*) with a full direction, containing the son's name and place of residence, is not a good agreement within the statute (h)(50).

It seems that the signature of the purchaser by himself or his agent, on the back of the particulars and conditions of sale, with the sum opposite to it, is a sufficient compliance with the directions of the act(i).

And, as we have seen, an agreement not signed, may

- (e) Welford v. Beazely, 3 Atk. 503. See 9 Ves. jun. 251.
- (f) Coles v. Trecothick, 9 Ves. jun. 234; 1 Smith's Rep. 233; but see Blore v. Sutton, 3 Mer. 237.
  - (g) Phillimore v. Barry, 1 Camp. Ca. 513.
  - (h) Selby v. Selby, Rolls, 1817, MS.
- (i) Vide supra, and Hodgson v. Le Bret, Camp. N. P. 233; Phillimore v. Barry, ib. 513; Goom v. Aflalo, 6 Barn. & Cress. 117; S. C. 9 Dowl. & R. 148; cases on the 17th sect.; Emmerson v. Heelis, 2 Taunt. 38.

done, the instrument was not complete as the last will of the testatrix. 1 Mer. 503. See Beaty v. Beaty, 1 Addams, 154.

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<sup>(50)</sup> See Whitwell v. Wyer, 11 Mass. Rep. 6. Bailey v. Ogdens, 3 Johns. Rep. 399.

be supported by a signature to a writing referring to the agreement. .

But the mere altering the draft of the conveyance will not take a case out of the statute(k); neither will the writing over of the whole draft by the defendant with his own hand be sufficient, as there must be a signature(l). To this rule we may, perhaps, refer the case of Stokes v. Moore(m); where the defendant wrote instructions for a lease to the plaintiff, in these words: viz. "The lease renewed; Mrs. Stokes to pay the King's tax; also to pay Moore 24l. a year, half-yearly; Mrs. Stokes to keep the house in good tenantable repair, &c." Stokes, the lessee, filed a bill for a specific performance, and the Court of Exchequer held it not to be a sufficient signing to take the agreement out of the statute; although it was not necessary to decide the point(51).

Lord Eldon is reported to have said, that he had some doubt of the doctrine in this case(n).

(\*)Mr. Baron Eyre appears to have put it on its true grounds. He said, that the signature is to have the effect of giving authenticity to the whole instrument; and if the name is inserted so as to have that effect, he did not think it signified much in what part of the instrument it was to be found; it was, perhaps, difficult, except in the case

<sup>(</sup>k) Hawkins v. Holmes, 1 P. Wms. 776, which overruled Lowther v. Carril, 1 Vern. 221. See Shippey v. Derrison, 5 Esp. Ca. 190.

<sup>(1)</sup> Ithel r. Potter, 1 P. Wms. 771, cited.

<sup>(</sup>m) Stokes v. Moore, 1 Cox, 219; Cox's n. to 1 P. Wms. 771. See 1 Smith's Rep. 244.

<sup>(</sup>n) And see Emmerson v. Heelis, 2 Taunt. 38, and observe how the purchaser's name was signed there. See also Morison v. Turnour, 18 Ves. jun. 175; Western v. Russel, 3 Ves. & Bea. 187; Ogilvie v. Foljambe, 3 Mer. 53.

<sup>(51)</sup> See Givens v. Calder, 2 Des. 171. See note to Weightman v. Caldwell, 4 Wheat. 89.

of a letter with a postscript, to find an instance where a name inserted in the middle of a writing can well have that effect; and then the name being generally found in a particular place, by the common usage of mankind, it may very probably [qu. properly] have the effect of a legal signature, and extend to the whole; but he did not understand how a name inserted in the body of an instrument, and applicable to particular purposes, could amount to such an authentication as is required by the statute.

III. In considering what signature satisfies the requisition of the statute, we have necessarily adverted to signatures by agents; and it will now be proper to consider who will be deemed an agent lawfully authorized within the statute of frauds to sign an agreement for the sale or purchase of an estate (52).

In the first and third sections of the statute of frauds, which relate to leases, &c. the writing is required to be signed by the parties making it, or their agent authorized by writing. This latter requisite is omitted in the fourth and seventeenth sections of the statute(I). The Legislature (\*) seems to have taken this distinction, that where an interest is intended to be actually passed, the agent must be authorized by writing; but that where a mere agreement is entered into, the agent need not be constituted by writing; and therefore an agent may be authorized by parol to treat for, or buy an estate, although the contract

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<sup>(</sup>I) In a note to Mr. East's 7th vol. p. 565, it is said, that by the fourth section, to affect lands, the note must be signed by an agent thereunto lawfully authorized by writing, &c., which words, "by writing," are omitted in the seventeenth section, touching the sale of goods. This mistake must be attributed to the hurry of the press, for the agent is in neither section required to be authorized by writing.

<sup>(52)</sup> See Irvin v. Thompson, 4 Bibb, 295.

itself must be in writing(o)(53). It is, however, in all cases, highly desirable that the agent should have a written authority. Where he has merely a parol authority, it must frequently be difficult to prove the existence and extent of it(p); although it may be observed that his testimony will be received with great caution against his signature as agent. If, however, at the time of signing, he make a declaration that he has no authority, his principal will not be bound(q). But of course, although he purchase in his own name, yet the fact of the agency so as to charge the principal may be made out by parol evidence(r).

Although an agent is authorized to sell at a particular price, yet it seems that his clerk cannot contract without a special authority or agreement for that purpose(s); which, however, need not be in writing.

(\*) The principal may revoke the authority of the agent at any time before an agreement is executed according to the statute, although the agent has previously agreed verbally to sell the property(t); and an intended purchaser

<sup>(</sup>o) Waller v. Hendon, 5 Vin. Abr. 524, pl. 45; Wedderburne v. Carr, in the Exchequer, T. T. 1775; 3 Wooddes. 423, cited; Rucker v. Cammeyer, 1 Esp. Ca. 175; Coles v. Trecothick, 9 Ves. jun. 234; 1 Smith's Rep. 233; Barry v. Lord Barrymore, 1 Sch. & Lef. Rep. 28, cited; Clinan v. Cooke, ib. 22; Emmerson v. Heelis, 2 Taunt. 38.

<sup>(</sup>p) Mortlock v. Buller, 10 Ves. jun. 292. See Daniel v. Adams, Ambl. 495; Charlewood v. the Duke of Bedford, 1 Atk. 497; and see 5 Vin. Abr. 522, pl. 35; Wyatt v. Allen, MS. App. No. 9.

<sup>(</sup>q) Howard v. Braithwaite, 1 Ves. & Beam. 202.

<sup>(</sup>r) Wilson v. Hart, 1 Moore, 45.

<sup>(</sup>s) Coles v. Trecothick, 9 Ves. jun. 234.

<sup>(</sup>t) See Farmer v. Robinson, 2 Campb. 339, n.

<sup>(53)</sup> See Ewing v. Tees, 1 Binn. 450. Talbot v. Bowen, 1 Marsh. Ken. Rep. 436.

may in like manner revoke his authority to his agent to

purchas e(u).

The statute requires every agreement as to lands, or some memorandum or note thereof, to be in writing, and signed by the party to be charged, or some other person thereunto, (that is, to the signing thereof)(x) by him authorized. And that as to goods, some note or memorandum in writing of the bargain shall be made and signed by the parties to be charged by such contracts, or their agents, thereunto authorized. And yet it has been decided, that the signature of the party to be charged by himself or agent is sufficient, even in a contract for goods(y), although the other party has not signed, and consequently is not bound; so that there appears to be no difference between the two clauses of the statute, in regard to the appointment and power of an agent.

It has, however, been repeatedly decided, that an auctioneer is the agent of both parties upon a sale of goods, so as to be enabled to bind them both under the statute(z)(54); whilst, on the contrary, it has been decided, and lately seemed to be the prevailing opinion, that the auctioneer is not the agent of the purchaser upon a sale (\*)by auction of *estates*, so as to be authorized to bind him by setting down in writing the terms of the contract(a);

<sup>(</sup>u) As to sales by auction, see Blagden v. Bradbear, 12 Ves. jun. 467; Mason v. Armitage, 13 Ves. jun. 25.

<sup>(</sup>x) See 1 Ves. & Beam. 207.

<sup>(</sup>y) Allen v. Bennet, 3 Taunt. 169.

<sup>(</sup>z) Simon v. Motivos, 3 Burr. 1921; Bull. Ni. Pri. 280; 1 Blackst. 599; Rucker v. Cammeyer, 1 Esp. Ca. 105; Hinde v. Whitehouse, 7 East, 558; and see Rondeau v. Wyatt, 2 H. Blackst. 67; and 1 Ca. & Opin. 142, 143; Phillimore v. Barry, 1 Camp. Ca. 513; and see the observations in the 2d edit. of this work, p. 57—64.

<sup>(</sup>a) Stansfield v. Johnson, 1 Esp. Ca. 101; Walker v. Constable, 2

<sup>(54)</sup> See Brown v. Gilliland, 3 Des. 540.

<sup>(\*106)</sup> 

but in a late case, upon the sale of an interest within the fourth section, the Court of Common Pleas held, that the auctioneer was an agent for the purchaser, even upon a sale of estates (55). Lord C. J. Mansfield, in delivering judgment, asked, By what authority does he write down the purchaser's name? By the authority of the purchaser. These persons bid, and announce their biddings loudly. and particularly enough to be heard by the auctioneer. For what purpose do they do this? That he may write down their names opposite to the lots; therefore he writes the name by the authority of the purchaser, and he is an agent for the purchaser(b). In a later case(c), the Court of Common Pleas adhered to their former decision, and they considered the signature by the auctioneer of the purchaser's name alone, sufficient, although he was only an agent, to bind the principal; and the conditions expressly required that the highest bidder should sign a contract for the purchase. The principal, however, was present, and did not object to the signature by the auctioneer until after it was made. The action in this case was brought for the auction duty. Upon a bill filed by the seller for a specific performance, the Master of the Rolls decreed it, following the decisions in the Common

Esp. Ca. 659; 1 Bos. & Pull. 306; Buckmaster v. Harrop, 7 Ves. jun. 341; 13 Ves. jun. 456; Coles v. Trecothick, 9 Ves. jun. 234; 1 Smith, 257. See 13 Ves. jun. 473.

<sup>(</sup>b) Emmerson v. Heelis, 2 Taunt. 38. See 1 Cas. and Opin. 142, 143.

<sup>(</sup>c) White v. Proctor, 4 Taunt. 209.

<sup>(55)</sup> In the case of M·Comb v. Wright, it was decided, that an auctioneer is the agent of the purchaser, either of lands or goods, at auction, to sign a contract for him, as the highest bidder; and his writing the name of the purchaser, as the highest bidder, on the memorandum of sale, immediately on receiving the bid, and knocking down the hammer, is a sufficient signing of the contract within the statute of frauds. 4 Johns. Ch. Rep. 659.

Pleas, although his own opinion was, that an auctioneer is not the agent of the purchaser(d). The rule, therefore, (\*)may now be laid down generally, that an auctioneer is an agent lawfully authorized by the purchaser(56). It was always clear, that an auctioneer, appointed by a vendor, was a good agent for him within the statute(e).

And although a purchaser bid by an agent, yet the auctioneer is still duly authorized to sign the agree-

ment(f).

The agent must be a third person: neither of the contracting parties can be the agent of the other(g); and therefore, although a purchaser is bound by the signature of the auctioneer, yet the auctioneer himself cannot maintain an action upon such a contract, because the agent whose signature is to bind the defendant must not be the other contracting party upon the record(h).

This, however, has since been doubted (i); and it has been held that the auctioneer's clerk can bind the purchaser by an entry made in his presence. The Court considered the clerk as agent for both parties. The auctioneer and his clerk may be considered as the constituted agents of the vendor; he appoints the former to announce the biddings, and the latter to take down the names of the purchasers, and the prices of the lots. The clerk may be considered not only as the agent of the vendors but also of the purchasers. By their silence, when the hammer

(e) Vide Supra.

<sup>(</sup>d) Kemys v. Proctor, 3 Ves. & Bea. 57; 1 Jac. & Walk. 350; Kenworthy v. Schofield, 2 Barn. & Cress. 945; 4 Dowl. & R. 556.

<sup>(</sup>f) Emmerson v. Heelis, 2 Taunt. 38; White v. Proctor, 4 Taunt. 209.

<sup>(</sup>g) See Wright v. Dannah, 2 Camp. 283.

<sup>(</sup>h) Farebrother v. Simmons, 5 Barn. & Ald. 333.

<sup>(</sup>i) Bird v. Boulter, 1 Nev. & Mann. 313.

<sup>(56)</sup> See Davis v. Robertson, 1 Rep. Con. Ct. 71. M. Comb v. Wright, 4 Johns. Ch. Rep. 659. Cleaves v. Foss, 4 Greenl. 1.

<sup>(\*107)</sup> 

falls, he has their authority to execute the contract on their behalf. It was not necessary to overrule Farebrother v. Simmons; but the opinion of the Court was in favor of the auctioneer's power to sign as agent of the contracting party. It is certainly irregular that the contracting parties should act as each other's agents, but it (\*)is very different where the contract is signed by an individual who is not either of the contractors. Were it to be held otherwise, no broker could maintain an action in his own name for the breach of a contract signed by him; and at any auction, if the auctioneer or his clerk were not allowed to be the agent of the contracting parties at every bidding, each purchaser would have to come to the table and sign his own name.

Finally, a contract by one as agent for another is valid under the statute, although the alleged agent had no authority at the time, provided that the alleged principal afterwards ratifies the contract(j).

## SECTION III.

Of Parol agreements not within the Statute.

I. We have seen what is considered a sufficient agreement to take a case out of the statute; but there are cases in which the performance of an agreement will be compelled, although the terms of it are not reduced to writing: for though the statute provided that no agreement should be good, unless signed by the party to be bound thereby, or some person authorized by him, yet on all the questions upon that statute, the purport of making it has been considered, viz. to prevent frauds and per-

<sup>(</sup>j) Maclean v. Dunn, 4 Bingh. 722; 1 Moo. & P. 761.

juries; and where there has appeared to be no danger of either, the courts have endeavored to take the case out of the statute(k).

Upon this ground it was that in the case of Simon v. Motivos, Lord Mansfield and Mr. Justice Wilmot (\*)expressed a clear opinion, in which Mr. Justice Yates was inclined to concur, that sales by auction were not within the statute, because the solemnity of that kind of sale precludes all perjury as to the fact itself of sale. The case, however, which arose upon the sale of goods, was determined upon the ground of the constructive agency of the auctioneer(l), who had set down in writing the name of the purchaser, &c.(m).

Succeeding Judges have entertained a different opinion on the great question, whether sales by auction are within the statute of frauds; and it has accordingly been since frequently decided, that sales by auction of estates are within the statute (n)(57). And although the point has never been decided, yet, from the present temper of the

<sup>(</sup>k) See 1 Ves. 221.

<sup>(</sup>l) Vide supra.

<sup>(</sup>m) 3 Burr. 1921; Bull. Ni. Pri. 286; 1 Blackst. 599.

<sup>(</sup>n) Stansfield v. Johnson, 1 Esp. Ca. 101; Walker v. Constable, 2 Esp. Ca. 659; 1 Bos. & Pull. 306; Buckmaster v. Harrop, 7 Ves. jun. 341, affirmed on appeal, Dec. 1806; Blagden v. Bradbear, 12 Ves. jun. 466; and see Coles v. Trecothick, 9 Ves. jun. 249; Hinde v. Whitehouse, 7 East, 558; Mason v. Armitage, 13 Ves. jun. 25; Higgenson v. Clowes, 15 Ves. jun. 516. The case of Symonds v. Ball, 8 Term Rep. 151, turned on the particular provisions of another act of parliament.

<sup>(57)</sup> Particulars of sale of lands, advertised to be sold at auction, signed by the vendors, held to be a sufficient memorandum in writing, within the statute. Hobby v. Finch, Kirby, 14. Ellsworth, J. dissenting.

In the state of New-York, it has been decided, that sales of estates, at auction, by the sheriff, are within the statute, and to pass the estate, require a note or memorandum in writing. Jackson v. Catlin, 2 Johns. Rep. 248. S. C. affirmed on error, 8 Johns. Rep. 406. 2d edit. Simonds v. Catlin, 2 Caines' Rep. 61, 64.

<sup>(\*109)</sup> 

courts, it seems probable that it will be determined, that sales by auction, even of goods, are within the statute(0).

But on the ground that there is no danger in such a transaction of either fraud or perjury, a sale before a Master, under the decree of a court of equity, will be carried into execution, although the purchaser did not subscribe any agreement. The judgment of the Court, in confirming the purchase, takes it out of the statute (p)(58).

So if, under a reference to a Master, an agreement be made to lay out trust-money in the purchase of particular lands, and the Master make his report accordingly, and (\*)the report be confirmed without any opposition by the owner of the estate, the purchase will be carried into a specific execution, although no agreement was signed by the vendor. The sale is a judicial sale, which takes it entirely out of the statute(q)(59).

II. It has been repeatedly determined in equity(r), that if a bill be brought for the execution of an agreement not in writing, nor so stated in the bill, yet if the defendant put in his answer, and confess the agreement, that takes the case entirely out of the mischief intended

<sup>(</sup>o) So decided in Kenworthy v. Schofield, 2 Barn. & Cress. 945; 4 Dowl. & R. 556.

<sup>(</sup>p) Attorney General v. Day, 1 Ves. 218; and see 12 Ves. jun. 472.

<sup>(</sup>q) S. C.

<sup>(</sup>r) Croyston v. Banes, Prec. Cha. 208; and see 1 Ves. 221, 441; Ambl. 586; Mose. 370; and Symondson v. Tweed, Prec. Cha. 437; Gilb. Eq. Rep. 35; Wanby v. Sawbridge, 1 Bro. C. C. 414, cited.

<sup>(58)</sup> In Boykin's Dev. v. Smith, 3 Munf. 102, it was held, that a release entered by verbal direction, in open Court, was valid, and satisfied the statute.

<sup>(59)</sup> In relation to this subject, see the reasoning of KENT, J. in Simonds v. Catlin, 2 Caines' Rep. 64.

to be prevented by the statute(60); and there being no danger of perjury, the Court would decree it; and if the defendant should die, upon a bill of revivor against his heir, the same decree would be made as if the ancestor were living, the principle going throughout, and equally binding the representatives(s).

Lord Chancellor Bathurst, however, held that an agreement, not in part performed, could not be carried into execution, although confessed by the answer. In Eyre v. Popham(t), addressing himself to Mr. Ambler, he asked if there was any case in which there had been a decree founded upon a confession generally without a part performed? and Mr. Ambler replied, that in some of the cases, the Chancellor had been mentioned to have said it, but he never found a decree. In giving judgment, his Lordship is reported to have said, "This is not an agreement in writing, upon the statute of frauds; but the question is, whether it is an agreement which so appears as that the Court will decree a performance. It has been (\*)said, that it is a known rule in this Court, that where an agreement appears confessed, the Court will decree a performance, though no part has been performed: some dictums there have been, but Mr. Ambler confesses that he has found no decree—that where the substance clearly appears, though in parol, without any part performed, the Court will decree an agreement to be executed. I think it cannot be possible; this Court cannot repeal the statute of frauds, or any statute. The King has no such power, by the constitution, intrusted to him; and therefore there

<sup>(</sup>s) Per Lord Hardwicke, see 1 Ves. 221.

<sup>(</sup>t) Lofft, 808, 809; and see Eyre v. Iveson, 2 Bro. C. C. 563, cited.

<sup>(60)</sup> See Smith v. Brailsford, 1 Des. 350. Kerr v. Love, 1 Wash. 172. Fowler v. Lewis, 3 Marsh. Ken. Rep. 445. See contra, Thompson v. Tod, 1 Peters' Rep. 388.

<sup>(\*111)</sup> 

can be no such power in his delegates. The only case I know that takes a contract out of the statute is of fraud, and the jurisdiction of this Court is principally intended to prevent fraud and deceit. Where a party has given ground to another to think he had a title secured, the Court will secure it to him. The ground, therefore, in making and refusing decrees, has been fraud. It can never be laid down by the Court, that where the substance appears it shall be executed. It would not have been so at common law."

In the discussion of the foregoing case, neither the bar nor the court appear to have been aware of a case before Lord Chancellor Macclesfield(u), in which the defendant having pleaded the statute of frauds to a bill seeking a specific performance of a parol agreement, his Lordship said, the plea was proper, but then the defendant ought, by answer, to deny the agreement; for if he confessed the agreement, the Court would decree a performance, notwithstanding the statute; for that such confession would not be looked upon as perjury, or intended to be prevented by the statute. And he therefore confirmed an order, that the plea should stand for an answer, with (\*) liberty for the plaintiff to except thereto, and that the benefit thereof should be saved to the defendant until the hearing of a cause. And Lord Hardwicke appears to have entertained the same opinion(x)(61).

In Whitchurch v. Bevis(y), Lord Thurlow at first

<sup>(</sup>u) Child v. Godolphin, 1 Dick. 39; 2 Bro. C. C. 566, cited; and See Hartley v. Wilkinson, Irish Term Rep. 357.

<sup>(</sup>x) See Cottington v. Fletcher, 2 Atk. 155; and see 3 Atk. 3; but see 4 Ves. jun. 24.

<sup>(</sup>y) 2 Bro. C. C. 559; 2 Dick. 664.

<sup>(61)</sup> Smith v. Brailsford, 1 Des. 350. In this case the defendant admitted by his answer, that he had taken possession of, and held the land under the agreement.

expressed his opinion, that the only effect of the statute was, that an agreement should not be proved aliunde. No evidence that could be given would sustain the suit if the defendant answered and denied the agreement. In this case the agreement was confessed, but the statute was pleaded, and it was ultimately decided on its own particular circumstances. Lord Thurlow said, he meant to determine upon the ground of this particular case; because it might become to be more seriously considered what sort of a verbal agreement, notwithstanding the plea of the statute of frauds, might be sustained, as being confessed by the answer, so as the Court would carry it into execution. His Lordship added, that he was prepared to say, if there were general instructions for an agreement, consisting of material circumstances to be hereafter extended more at large, and to be put into the form of an instrument, with a view to be signed by the parties, and no fraud, but the party takes advantage of the locus panitentia, he should not be compelled to perform such an agreement as that, when he insists upon the statute of frauds.

It is curious to observe the different opinions which have prevailed on this point. Lord Macclesfield held, that if the agreement was confessed, even a plea of the statute would not protect the defendant; in which opinion he seems to have been followed by Lord Hardwicke. On the other hand, Lord Bathurst thought that, unless there (\*)were fraud, an admission of the agreement by the defendant would not enable the Court to decree it, although the defendant did not insist on the statute. Lord Thurlow appears to have been of opinion, that if the agreement was admitted, the statute could only be used as a defence where there was a clear locus pænitentiæ, but that evidence could not be admitted to falsify the defendant's answer.

None of the foregoing opinions has, however, been attended to. Mr. Baron Eyre seems to have led the way (\*113)

in holding, that if the defendant, by his answer, insisted upon the statute of frauds, a specific performance could not be decreed, although he confessed the agreement(z). And Lord Thurlow, notwithstanding his opinion in Whitchurch v. Bevis, said, in the prior case of Whitbread v. Brockhurst, that it should rather seem that if the defendant confesses the agreement in his answer, but insists upon the statute, it would be more simple and conformable to reason to say, that the statute should be a bar to the plaintiff's claim(a); and these opinions have been adopted by Lord Rosslyn and Lord Eldon(b); and Sir William Grant actually decided, that the statute may be used as a bar to the relief, although the agreement be admitted(c). It is immaterial, he said, what admissions are made by a defendant insisting upon the benefit of the statute, for he throws it upon the plaintiff to show a complete written agreement; and it can no more be thrown upon the defendant to supply defects in the agreement, than to supply the want of an agreement(62).

<sup>(</sup>z) Stewart v. Careless, 2 Bro. C. C. 564, 565, cited; Walters v. Morgan, 2 Cox, 369.

<sup>(</sup>a) See 1 Bro. C. C. 416.

<sup>(</sup>b) Moore v. Edwards, 4 Ves. jun. 23; Cooth v. Jackson, 6 Ves. jun. 12; Row v. Teed, 15 Ves. jun. 375; see Rondeau v. Wyatt, 2 II. Blackst. 63; and 1 Rose, 300.

<sup>(</sup>c) Blagden v. Bradbear, 12 Ves. jun. 464; see also 2 Ball & Beat. 349.

<sup>(62)</sup> Judicial opinions, as to the effect or necessity of an answer, on a bill for the specific performance of a parol agreement for the sale of lands, admitting or denying the agreement, have been almost as diversified in the United States, as in England. In Virginia, it has been determined, that if the defendant by his answer admit, that certain goods were to be charged to him, upon certain conditions, there being no other evidence in the case, such admission ought to be the rule by which the charge should be regulated. Kerr v. Love, 1 Wash. 172. In Pennsylvania, it seems to be the settled rule, that although the defendant answer, and admit the agreement as stated in the bill, he may, neverthe-

Where, however, a defendant has, by answer, admitted (\*)the agreement, and submitted to perform it, he cannot, by an answer to an amended bill, plead the statute of

frauds(d).

If the defendant deny the agreement, he may be tried for perjury; but a conviction will not enable equity to decree a performance of the agreement(e)(I); and therefore, as the plaintiff cannot avail himself in any civil proceedings of the conviction of the defendant, he is a competent witness to prove the perjury(f).

III. There are other cases taken out of the statute, not so much on the principle of no danger of perjury, as that the statute was not intended to create or protect fraud. Lord Keeper North appears to have entertained a floating

(a) Spurrier v. Fitzgerald, 6 Ves. jun. 548.

(f) The King v. Boston, 4 East, 572.

<sup>(</sup>e) Bartlett v. Pickersgill, 4 Burr. 2255; 4 East, 577, n. (b); J Cox, 15. See Rastel v. Hutchinson, 1 Dick. 44, and Fell v. Chamberlain, 2 Dick. 484; Burdon v. Browning, 2 Taunt. 520.

<sup>(1)</sup> It appears that the plaintiff in Fell v. Chamberlain did prefer a bill of indictment for perjury against the defendant; and the Master of the Rolls granted an order to the six clerks to deliver the bill and answer, interrogatories, and depositions of witnesses to a solicitor, in order to be produced at the trial. Reg. Lib. A. 1772, fo. 496.

less, protect himself against the performance of it, by pleading the statute. Thompson v. Tod, 1 Peters' Rep. 388. In South Carolina, the contrary rule has been adopted. Smith v. Brailsford, 1 Des. 350. On a bill for a specific performance of a parol agreement for the sale of lands, in a case not tinctured with fraud, if the defendant chooses to avail himself of the statute, he need not, by his answer, admit or deny the agreement, the law having declared it void. Givens v. Calder, 2 Des. 171, 190. See Argenbright v. Campbell, 3 Hen. & Munf. 144, 153, 160, 161. Grant v. Craigmiles, 1 Bibb, 203. And in Kentucky, it has been held, that although the defendant omit to plead the statute of frauds, a specific peformance will not be decreed, unless he confess the agreement, Fowler v. Lewis, 3 Marsh. Ken. Rep. 445.

opinion, although he never actually decided the point, that if the plaintiff laid in his bill that it was part of the agreement that the agreement should be put into writing, it would take the case out of the statute(g). In a case before Lord Thurlow(h), this doctrine was stated at the bar; and in answer to it, his Lordship said, he took that to be a single case, and to have been overruled. If you interpose the medium of fraud, by which the agreement is prevented from being put into writing I agree to it, otherwise (\*)I take Lord North's doctrine, 'that if it had been laid in the bill, that it was a part of the agreement that it should be put into writing, it would have done,' to be a single decision, and contradicted, though not expressly, yet by the current of opinions."(63)

So where agreements have been carried partly into execution, the Court will decree the performance of them, in order that one side may not take advantage of the statute, to be guilty of fraud(i)(I)(64).

- (g) Hollis v. Whiting, or Edwards, 1 Vern. 151, 159; Leake v. Morrice, 2 Cha. Ca. 135.
  - (h) Whitchurch v. Bevis, 2 Bro. C. C. 565.
  - (i) See 1 Ves. 221; Taylor v. Beech, 1 Ves. 297.

<sup>(</sup>I) The ground of relief in these cases is fraud, and that species of fraud which is conusable in equity only; although it seems that the Court of King's Bench once held, that where an agreement was partly executed, it was totally out of the statute. See 1 Bro. C. C. 417.

<sup>(63)</sup> See Dandridge v. Harris, 1 Wash. 326.

<sup>(64)</sup> See Niven v. Belknap, 2 Johns. Rep. 573, 587. Smith v. Patton's Les. 1 Serg. & Rawle, 80. Wetmore v. White, 2 Caines' Cas. in Error, 87. Billington v. Welsh, 5 Binn. 129, 131. The contract, as laid in the bill, must be made out by clear and satisfactory proof; and the act of part performance must refer to the identical contract set up; it must be unequivocal; a reference to some agreement is not sufficient. Phillips v. Thompson, 1 Johns. Ch. Rep. 131. Parkhurst v. Van Cortlandt, 1 Johns. Ch. Rep. 273. In certain cases, where, by the rules of law, a court of equity is not warranted in decreeing the ex-

An agreement will not be considered as partly executed, unless the acts done are such as could be done with no other view or design than to perform the agreement; or perhaps, to speak more correctly, with the view of the agreement being performed; and if it do not appear but the acts done might have been done with other views, the agreement will not be taken out of the statute (k).

Neither will acts merely introductory, or ancillary to

(k) Gunter v. Halsey, Ambl. 586; Lacon v. Mertins, 3 Atk. 1; and see 19 Ves. jun. 479.

ecution, of a contract in specie, a compensation will be awarded to the party injured by the non-performance of the agreement. As where, by mistake, the defendant was unable to perform his contract, which was for the sale of land. M'Ferran v. Taylor, 3 Cranch, 270, 281. See Hepburn v. Auld, 5 Cranch, 262. Pratt v. Law, 9 Cranch, 456. So also, where a party has sustained an injury by the non-performance of a contract within the statute of frauds, for which he ought to be compensated, and for which he has no remedy, or, at best, a doubtful and inadequate one, at law, an issue of quantum damnificatus will be awarded. Phillips v. Thompson, 1 Johns. Ch. Rep. 131. So, a reasonable compensation will be afforded to a party, who has entered into possession of lands, and made beneficial and lasting improvements, under an imperfect agreement, either to purchase, or take a lease of them. Parkhurst v. Van Cortlandt, 1 Johns. Ch. Rep. 273. But see S. C. on appeal, 14 Johns. Rep. 15. contra; the Court of Errors decreed a specific performance of the agreement. See Sherburn v. Fuller, 5 Mass. Rep. 133, 138. as to the recovery of money when the contract is rescinded. Under the act of Pennsylvania, " for the prevention of frauds and perjuries," a parol agreement for the sale of lands, is not void; but the act restricts the operation of the agreement, so far, that no title can be derived by virtue of it; yet an action will lie to recover damages for the non-performance of such an agreement: Bell v. Andrews, 4 Dall. 152. See Ewing v. Tees, 1 Binn. 450.

Where a contract relating to an interest in lands, has been executed by one party, it may be proved by parol evidence; and a court of equity will either decree a specific performance, or a return of the money expended, as the equity of the case may require. Cady v. Cadwell, 5 Day, 16.

(\*116)

an agreement, be considered as a part-performance, although attended with expense. Therefore, delivering an abstract, giving directions for conveyances, going to view the estate, fixing upon an appraiser to value stock, making valuations, &c.(l), will not take a parol agreement out of the statute(65).

- (\*)But if possession be delivered by the purchaser, the agreement will be considered as in part executed(m)(66);
- (l) Clerk v. Wright, 1 Atk. 12; Whitbread v. Brockhurst, 1 Bro. C. C. 412; Cole v. White, 1 Bro. C. C. 409, cited; Whitchurch v. Bevis, 2 Bro. C. C. 559; Whaley v. Bagenal, 6 Bro. P. C. 645; Cooke v. Tombs, 2 Anst. 420; and see Cooth v. Jackson, 6 Ves. jun. 12; and Redding v. Wilkes, 3 Bro. C. C. 400.
- (m) Butcher v. Stapely, 1 Vern. 363; Pyke v. Williams, 2 Vern. 465; Lockey v. Lockey, Prec. Cha. 518; Earl of Aylesford's case, 2 Stra. 783; Binstead v. Coleman, Bunb. 65; S. C. MS. in tot verbis; Barrett v. Gomeserra, Bunb. 94; Lacon v. Mertins, 3 Atk. 1; Wills v. Stradling, 3 Ves. jun. 378; Bowers v. Cator, 4 Ves. jun. 91; Denton v. Stewart, 4th July 1786, cited in Mr. Fonbl. note to 1 Trea. Eq. 175 (I); Gregory v. Mighell, 18 Ves. jun. 328; Kine v. Balfe, 2 Ball & Beat. 343; Morphett v. Jones, Rolls, Feb. 1818, MS.; 1 Swanst. 172.

<sup>(</sup>I) In this case the plaintiff not only purchased the house, but also the furniture, for which she had actually paid; and it appears by the decree, that there was a receipt given by the defendant, the contents of which, however, are not stated in the Registrar's book. The defendant positively denied the agreement, and insisted that the plaintiff was only tenant at will. Reg. Lib. A. 1785, fo. 552, by the name of Denton v. Seward; ibid. 717, by the name of Denton v. Stewart.

<sup>(65)</sup> See Jones v. Peterman, 3 Serg. & Rawle, 546. Niven v. Belknap, ut supra. Davenport v. Mason, 15 Mass. Rep. 85. Bassler v. Niesly, 2 Serg. & Rawle, 355. Phillips v. Thompson, 1 Johns. Ch. Rep. 131. Parkhurst v. Cortlandt, 1 Johns. Ch. Rep. 273. Givens v. Calder, 2 Des. 171.

<sup>(66)</sup> See Wetmore v. White, 2 Caines' Cas. in Error, 87. [Contra, at law, per KENT, Ch. J. Jackson v. Pierce, 2 Johns. Rep. 221. See Davenport v. Mason, 15 Mass. Rep. 92.] Syler's Les. v. Eckhart, 1 Binn. 378. Billington's Les. v. Welsh, 5 Binn. 129, 131. Smith v. Patton's Les. 1 Serg. & Rawle, 80. Bassler v. Niesly, 2 Serg. & Rawle,

especially if he expend money in building or improving according to the agreement (n)(67), for the statute should never be so turned, construed, or used, as to protect or be a mean of fraud (o).

Possession, however, must be delivered in part-performance; for if the purchaser obtain it wrongfully, it will not avail  $\lim(p)(68)$ . And a possession which can be referred to a title distinct from the agreement will not take a case out of the statute. Therefore, possession by a tenant cannot be deemed a part-performance. The delivery of possession, by a person having possession, to the person claiming under the agreement, is a strong and marked circumstance; but a tenant of course continues in possession, unless he has notice to quit; and (\*)the mere fact of his continuance in possession (which is all that can be admitted, for quo animo he continued in possession, is not a subject of admission) cannot weigh with the Court(q)(69).

- (n) Foxcraft v. Lister, 2 Vern. 456; Gilb. Eq. Rep. 4, cited; Colles P. C. 108, reported; Floyd v. Buckland, 2 Freem. 268; Mortimer v. Orchard, 2 Ves. jun. 243; Toole v. Medlicott, 1 Ball & Beatty, 393. See Wheeler v. D'Esterre, 2 Dow, 359; and see 19 Ves. jun. 479.
  - (o) See 3 Burr. 1919.
  - (p) Cole v. White, 1 Bro. C. C. 409, cited.
- (q) Wills v. Stradling, 3 Ves. jun. 378; Smith v. Turner, Prec. Cha. 561. cited; Savage v. Carrol, 1 Ball & Beatty, 265.
- 355. Jones v. Peterman, 3 Serg. & Rawle, 546. Fox v. Longly, 1 Marsh. Ken. Rep. 388. Downey v. Hotchkiss, 2 Day, 225. Ebert v. Wood, 1 Binn. 216. Smith v. Brailsford, 1 Des. 350. Niven v. Belknap, 2 Johns. Rep. 573. 587. Parkhurst v. Van Cortlandt, 1 Johns. Ch. Rep. 273. S. C. on appeal, 14 Johns. Rep. 15.
- (67) See the following cases, inserted in the preceding note. Wetmore v. White; Syler's Les. v. Eckhart; Smith v. Patton's Les.; Jones v. Peterman; Downey v. Hotchkiss; Fox v. Longly; Niven v. Belknap; Parhhurst v. Van Cortlandt.
  - (68) See Givens v. Calder, 2 Des. 171.
  - (69) See Parkhurst v. Van Cortlandt, 14 Johns. Rep. 15. on appeal. (\*117)

But if he pay an additional rent, although that is per se an equivocal circumstance (for it may be that he shall hold only from year to year, the lease being expired), yet there may be other inducements. If, therefore, it be averred that the landlord accepted the additional rent upon the foot of the agreement, the acceptance upon the ground of the agreement will not be equivocal at all. The landlord, in such a case, must answer whether it was accepted upon a holding from year to year, or any other ground(r).

If it be part of such a contract with a tenant in possession, that money shall be laid out, and it is one of the considerations for granting the lease (the laying out which must be then with the privity of the landlord), it is very strong to take it out of the statute(s). But it is necessary that the act should unequivocally refer to and result from the agreement, and such that the party would suffer an injury amounting to fraud, by the refusal to execute that agreement. Therefore, where upon the faith of a promise of a renewal, a tenant rebuilt a party-wall, the agreement was held to be within the statute. The act done was equivocal: for it would have taken place equally if there had been no agreement: it was such also as easily admitted of compensation, without executing the agreement. The money expended might be recovered from the landlord, if it was by the landlord that the expense was to be borne(t)(70).

(\*) In a late case, Lord Redesdale thought that it was absolutely necessary for courts of equity in these cases, to

<sup>(</sup>r) Wills v. Stradling, ubi sup.

<sup>(</sup>s) S. C.

<sup>(</sup>t) Frame v. Dawson, 14 Ves. jun. 386. See Lindsay v. Lynch, 2 Scho. & Lef. 1; O'Reilly v. Thompson, 2 Cox, 271.

<sup>(70)</sup> See Philips v. Thompson, 1 Johns. Ch. Rep. 149, 150. vol. 1. (\*118)

make a stand, and not carry the decisions farther (u)(71).

It is generally understood, that payment of a substantial part of the purchase-money will take a parol agreement out of the statute. How far this opinion is well founded, appears to be deserving of particular consideration (72).

There are four cases in Tothill, which arose previously

(u) See 2 Scho. & Lef. 5.

(71) Accordant, Philips v. Thompson, ut supra. per KENT. Grant v. Naylor, 4 Cranch, 234. King v. Riddle, 7 Cranch, 171. and Clementson v. Williams, 8 Cranch, 74. per MARSHALL, Ch. J.

In the later case of Kidder v. Hunt, 1 Pick. 328, which was assumpsit on the contract itself, setting forth the verbal agreement, which was for the lease of certain premises for five years, yielding and paying rent therefor, making repairs, &c.; whereupon the plaintiff entered into possession and expended money. Upon demurrer to the plea of the statute of frauds pleaded by the defendant, the court held the plea good. The ground of this decision was, that the contract related to an interest in land and not being in writing, no action according to the statute could be maintained on such a contract. But "certainly so much as has been expended by the plaintiff in money, or labor, may be recovered in an action for money paid, or for work done for the defendant. There are no doubt, cases proper for a court of chancery, such as those which relate to the execution of trusts, where the common law will give a remedy by an action of damages; and perhaps in a parol contract respecting land; where the party has been put to expense, as to his part of the contract, under circumstances which would amount to fraud by the other party, case might lie for damages for the fraud as was intimated in Boyd v. Stone, 11 Mass. 342; but this action is brought upon the contract itself, and to sustain it would be indirectly to give efficacy to a contract which the legislature says shall have none. It is on the ground of fraud only that the court of chancery undertakes to decree performance of such a contract." Vide Crocker v. Higgins, 7 Conn. 342; Jones v. Peterman, 3 S. & R. 545; Harris v. Knickerbacker, 5 Wend. 636.

(72) See Wetmore v. White, 2 Caines' Cas. in Error, 87. Billington v. Welsh, 5 Binn. 131. Smith v. Patton's Les. 1 Serg. & Rawle, 80. Bassler v. Niesly, 2 Serg. & Rawle, 355. Thompson v. Tod, 1 Peters' Rep. 388. Jackson v. Cutright, 5 Munf. 308.

to the statute of frauds, and appear to be applicable to the point under consideration; for equity, even before the statute of frauds, would not execute a mere parol agreement not in part performed. In the first case (x), which was heard in the 38th of Eliz. relief was denied, "because it was but a preparation for an action upon the "case." In the two next cases(y), which came on in the 9th of Jac. I., parol agreements were enforced, apparently on account of the payment of very trifling parts of the purchase-money, but the particular circumstances of these cases do not appear. The last case reported in Tothill(z), was decided in the 30th of Jac. I., and the facts are distinctly stated. The bill was to be relieved concerning a promise to assure land of inheritance, of which there had not been any execution, but only 55s. paid in hand, and the bill was dismissed. This point received a similar determination, in the next case on the subject before the statute, which is reported in Cha. Rep.(a), and was determined in the 15th Cha. II. So the same doctrine was adhered to in a case which occurred three years afterwards,(\*) and is reported in Freeman(b); for although a parol agreement for a house, with 20s. paid, was decreed without further execution proved, yet it appears by the judgment, that the relief would not have been granted if the defendant, the vendor, had demurred to the bill, which he had neglected to do, but had proceeded to proof. The last case I have met with previously to the statute, was decided in the 21st Car. II.(c), and there a parol agreement, upon which only 20s. were paid, was carried into a specific execution. This case probably turned, like

<sup>(</sup>x) William v. Nevil, Toth. 135.

<sup>(</sup>y) Ferne v. Bullock, Toth. 206; Clark v. Hackwell, ibid. 228.

<sup>(</sup>z) Miller v. Blandist, Toth. 85.

<sup>(</sup>a) Simmons v. Cornelius, 1 Cha. Rep. 128.

<sup>(</sup>b) Anon. 2 Freem. 128.

<sup>(</sup>c) Voll v. Smith, 3 Cha. Rep. 16.

the one immediately preceding it, on the neglect of the defendants to demur to the bill. It must be admitted, that the foregoing decisions are not easily reconcileable, yet the result of them clearly is, that payment of a trifling part of the purchase-money was not a part-performance of a parol agreement. Whether payment of a considerable sum would have availed a purchaser, does not appear. In Toth. 67, a case is thus stated: "Moyl v. Horne, by reason 200l. was deposited towards payment, decreed." This case may, perhaps, be deemed an authority that, prior to the statute, the payment of a substantial part of the purchase-money would have enabled equity to specifically perform a parol agreement; but it certainly is too vague to be relied on.

Our attention is now called to the statute itself. The clause relating to lands declares generally, that no contract, not in writing, shall be binding; there is also a clause in the act, which relates to sales of goods, which are declared to be binding if something is given in earnest to bind the bargain.

The first case in the books, subsequently to the statute, is in Freem. (d), where it is stated, that a contract for land, (\*) and a great part of the money paid, is void since the statute of frauds and perjuries; but the party that paid the money may, in equity (I), recover back the money (73).

## (d) 1 Freem. 486. ca. 664. b.

# (I) At this day it may be recovered at law.

In Sherburne v. Fuller, which was an action upon a contract touch-(\*120)

<sup>(73)</sup> At this day it may be recovered at law. [See Gillet v. Maynard, 5 Johns. Rep. 85; Sherburne v. Fuller, 5 Mass. Rep. 133. In Pennsylvania, it has been decided, that an action at law, would lie to recover damages accruing from the non-performance of a contract for the sale of lands, which, being within the statute of frauds, could not be decreed in specie. Bell v. Andrews, 4 Dall. 152. See also, Phillips v. Thompson, 1 Johns. Ch. Rep. 131.]

And for this Freeman states he saw Sir William Jones' opinion under his hand. This was about four years after the act. The next case is Leak v. Morrice(e), which occurred in the same year; the bill was to have an agreement performed by the defendant; which was, in effect, that the defendant should assign a term of years in his house and certain goods, for two hundred guineas, whereof he paid one in hand as earnest of the bargain, and three days after nineteen guineas more; and part of the bargain was, that it should be executed by writings, by a certain time. The defendant pleaded the statute of frauds, and alleged the money was only paid for the lease, but confessed the receipt of the twenty guineas, and offered to repay them. Lord Keeper North said, it was clear that the defendant

## (e) 2 Ch. Ca. 135; 1 Dick. 14.

ing the sale of lands; and it being objected that it was within the statute, and that the contract was proved only by parol evidence. It was answered, that when a contract within the statute is rescinded, either party may demand of the other the repayment of the money advanced, or the return of the thing delivered under the contract, and may support such demand by parol evidence. Parsons, C. J. said, "This position is generally true; and in this case, had the plaintiff advanced money to the defendant, or delivered him as bailiff a deed for safe custody, an action would have lain for the money or deed, or even trover for the deed, and parol evidence would support such action. But here the land was conveyed to Fuller by M., and the deed delivered to the former as evidence of his title: although he promised by parol that he would return it unrecorded, if the contract was rescinded; and on the return and cancelling of the deed, it was understood that he would be divested of the land. A promise to return a deed under such circumstances is in our opinion a promise concerning the sale of lands, as the title to the land was intended to be changed by the performance of the promise. This defect of written evidence cannot be aided by the receipt in writing: for that instrument proves a contract to account for money, and the parol evidence, given to explain it, either contradicts the contract declared on, or materially varies it. As the Justice of the case is with the plaintiff, we see no reason why he may not declare on the receipt, as on a promise to pay money.

ought to repay the money, but overruled the plea on another ground. In this case it does not appear to have occurred to either the bar or the court, that payment of money would take a parol contract for lands out of the statute. The case of Alsop v. Patten(f), arose about fifteen years afterwards. There a joint lessee of a building lease agreed to sell his moiety to the other lessee for four guineas, and accepted a pair of compasses in hand to bind the bargain. The vendor pleaded the statute to a bill filed by the purchaser for a performance in specie. Lord Chancellor Jefferies ordered him to answer, and saved the benefit of the plea to the hearing, as the agreement was, in some part, executed. In this case, unless there was a part-performance of the agreement, independently of the mere delivery of the compasses, it is (\*)clear that the Court confounded the section of the statute by which personal contracts are binding, if earnest is paid, with the clause relating to land. The next case is Seagood v. Meale(g), which arose thirty-four years after the case of Alsop v. Patten. The case was, that upon a parol agreement for sale of an estate for 150l., a guinea was paid, and the payment of the guinea was agreed to be clearly of no consequence in case of an agreement touching lands or houses, the payment of money being only binding in cases of contracts for goods. In this case we find the doctrine laid down generally, that the payment of money is not a part-performance of a parol agreement for lands, and no distinction was taken, as seems sometimes to have been thought, between the payment of a substantial part of the purchase-money, and of a trifling portion. Then comes the case of Lord Fingal, or Lord Pengal v. Ross, which was decided by Lord Cowper,

<sup>(</sup>f) 1 Vern. 472.

<sup>(</sup>g) Prec. Cha. 560.

<sup>(\*121)</sup> 

in the 8th of Anne(h)(I). A. agreed with B. to make him a lease for twenty-one years of lands rendering rent, B. paying A. 150l. fine. B. paid 100l. in part, then A. refused to execute the agreement; and upon a bill filed for a specific performance, the agreement was held to be within the statute; but the 100l. was decreed to be refunded. The Lord Chancellor said, the payment of this 100l. was not such a performance of the agreement on one part, as to decree an execution on the other; for the statute of frauds makes one sort of contracts, viz. personal contracts, good, if any money is paid in earnest. Now that statute says, that no agreement concerning (\*)lands shall be good, except it is reduced into writing; and therefore, a parol agreement, as it was in that case, would not be good by giving money by way of earnest. Thus far no room is left for doubt; but in Lacon v. Mertins(i), Lord Hardwicke laid it down, that paying money had always been considered as a part-performance. This, however, was a mere dictum; it was not necessary to decide the question; the cases on the subject were not cited; and another rule is laid down too generally in the same report. A case, indeed, is said to have been decided in 1750(k), at which time Lord Hardwicke was Chancellor, where the bill was to compel the acceptance of a lease under a parol agreement upon a fine of 150l. and 16l. paid in part of the same; and the plea was overruled, without hearing the counsel for the plaintiff, and the decision, it is said, appears by the Registrar's

<sup>(</sup>h) 2 Eq. Ca. Abr. 46. pl. 12.

<sup>(</sup>i) 3 Atk. 1.

<sup>(</sup>k) Dickinson v. Adams, 4 Ves. jun. 722, cited.

<sup>(</sup>I) It has been said, that this case is not to be found in the Registrar's book. See 4 Ves. jun. 721. The author himself has searched the Registrar's calendars for 1709 and 1710 without success. The search was made under the letters L. (the plaintiff being a lord) P. and F.

book(I). But it does not appear from this statement, whether there was or was not any other act of part-performance; and it is a sufficient objection to this decision, that the plaintiff's counsel were not heard, as no one can deny that the point was open to argument. The next case is a recent one(l), in which Lord Rosslyn held that the payment of a small sum, as five guineas, where the purchase-money is 100l., would not take the case out of the statute; but he seemed clearly of opinion, that payment (\*)of a considerable part of the purchase-money would be sufficient: and he treated the case of Lord Fingal v. Ross as ill determined. However, it was not necessary to decide the question. The opinion was clearly extra judicial. In the late case of Coles v. Trecothick(m), where the purchase-money was 20,000l. and 2,000l. were paid in part, the point was treated at the bar as doubtful, and the Court evidently declined giving an opinion on the subject.

Upon the whole, it appears clearly, that since the statute of frauds, the payment of a small sum cannot be deemed a part-performance (74). The dicta are in favor

(1) Main v. Melbourn, 4 Ves. jun. 720.

(m) 8 Ves. jun. 234; Ex parte Hooper, 1 Mer. 7.

<sup>(</sup>I) The author has searched the Registrar's calendars for 1750, with great attention, but without success. He met with only one case where the plaintiff's name was Dickinson, and there the defendant's name was Baskerville; and the case is on a different point. Reg. Lib. A. 1750, fol. 545. Neither does a case in the same book, fol. 514, by the name of Davids v. Adams, embrace the point in question. The search was made under the letter A. as well as the letter D.—Note, the case perhaps turned on the principle stated in page 125, infra.

<sup>(74)</sup> If the agreement be executed, or even partly executed, the parties are not permitted to treat it as a nullity. The statute does not wholly vacate the contract, but only inhibits all actions brought to enforce it. Its operation is limited by construction to such executory contracts as have been in no substantial part executed. Davenport v.

of a considerable sum being a part-performance, but this construction is not authorised by the statute, and it is op-

Mason, 15 Mass. 82. But it is not every part performance that will be sufficient. "I will not say, that according to adjudged cases, a parol lease for more than three years, may not be taken out of the act by delivery of possession. If attended with improvements by the lessee, it certainly would be established. To give weight to the possession, it must be a possession pursuant to the agreement. Therefore, where possession had been before a parol agreement for a lease for seven years it was held to be too doubtful to be considered as a part performance." Jones v. Peterman, 3 S. & R. 543. The principle is, that part performance will entitle the party to a decree for specific performance, if the acts of part performance were such as would not have been done, but for the agreement; and done with a view to perform it; and were also prejudicial to the party performing. Thus, in Davenpert v. Mason, 15 Mass. 89., where the parties with others agreed to become interested in the purchase of lands; but the title was to be held by a part for the benefit of all. An agreement under seal was executed; but it omitted any provision in respect to the payment of the respective shares of the purchase money; but in a suit against the defendant for his proportion of the plaintiff's advances, held, that he was entitled to judgment. Davenport v. Mason, Supra.

It is clear that no action at law will lie on the parol contract itself. 1 Pick. 328. And a parol agreement to execute a defeasance to an absolute deed has been held to be no ground of action at law; and the court said that "Chancery could afford no relief in this case; for the deed was made and delivered according to the intent of the parties; and the breach of promise is no more fraudulent than any other breach of trust or promise." Boyd v. Stone, 11 Mass. 342.

Where a tenant for life permitted the plaintiff to cut a ditch through her land, to supply his mill with water; and the former dying, the latter made a verbal agreement with the remainder man to purchase the ditch; and the purchase money to be ascertained by an award of arbitrators. The award having been made, the plaintiff sued his bill for a specific performance of the agreement; but the court dismissed the bill, on the ground that there was no part performance. Hamilton v. Jones, 3 Gill & J. 127. But the public may acquire an interest in land; an easement, by the consent of the owner, without writing; for it is by operation of law: And a contract to pay for land occupied as a road is a valid contract. 8 Johns. 256: S. P. 10 ib. 109. Before the R. S. no writing was necessary to give consent to lay out a road or to relinquish the damages: And where the defendant promised to pay the

posed by a case, in which the contrary was decided, upon the most convincing grounds. On this subject, Sir William Grant's admirable judgment in Butcher v. Butcher(n), must occur to every discerning mind; it turns on a subject so applicable to the present, that his arguments, with a slight alteration, directly bear upon it. To say that a considerable share of the purchase-money must be given, is rather to raise a question than to establish a rule. What is a considerable share, and what is a trifling sum? Is it to be judged upon a mere statement of the sum paid, without reference to the amount of the purchase-money?-If so, what is the sum that must be given to call for the interference of the Court? What is the limit of amount at which it ceases to be triffing, and begins to be substantial? If it is to be considered with reference to the amount of the purchase-money, what is the proportion which ought to be paid? Mr. Booth also was impressed with this difficulty, although his sentiments are not so forcibly (\*)expressed. Where, he asks, will you strike the line? And who shall settle the quantum that shall suffice in payment of part of any purchase-money, to draw the case

## (n) 9 Ves. jun. 382.

plaintiff a certain price for his verbal relinquishment of damages against the public, he was held liable to pay the stipulated damages. Noyes v. Chapin, 6 Wend. 461.

A parol agreement to share in the profits of a speculation in land is said not to be within the statute of frauds. 4 Conn. R. 568. No interest in lands shall pass otherwise than by deed or writing: but if one holds land in trust for another; and agrees verbally to sell and account for the proceeds of the sale, this agreement is not within the statute. Thus, in Hess v. Fox, 10 Wend. R. 436, where the mortgagee agreed to pay over to the mortgagor the surplus; the latter having released his right to redeem: held, that he was entitled to his action immediately upon the sale. "No question can arise here as to the validity of the agreement to sell; for that was performed, and it only remains to pay over the money, supported by the consideration of land conveyed to the promisor."

out of the statute; or ascertain what shall be deemed so triffing as to leave the case within it ?(o)(75).

Since the above observations were written, a decision of Lord Redesdale's has appeared, in which he held clearly that payment of purchase-money is not a part-performance; and although his Lordship did not advert to all the cases on the subject, yet it is sincerely to be hoped that his decision will put the point at rest. He said, that it had always been considered that the payment of money is not to be deemed a part-performance, to take a case out of the statute. Seagood v. Meale is the leading case on that subject: there a guinea was paid by way of earnest; and it was agreed clearly, that that was of no consequence in case of an agreement touching lands. Now, if payment of fifty guineas would take a case out of the statute, payment of one guinea would do so equally; for it is paid in both cases as part-payment, and no distinction can be drawn(p): but the great reason, he added, why part-payment does not take such an agreement out of the statute, is, that the statute has said, that in another case, viz. with respect to goods, it shall operate as a part-performance. And the Courts have therefore considered this as excluding agreements for lands, because it is to be inferred, that when the Legislature said it should bind in case of goods, and were silent as to the

<sup>(</sup>o) 1 Ca. and Opin. 136.

<sup>(</sup>p) See acc. Cordage v. Cole, 1 Saund 319.

<sup>(75)</sup> See Smith v. Patton's Les. 1 Serg. & Rawle, 80. Jackson v. Cutright, 5 Munf. 308. Welmore v. White, 2 Caines' Cas. in Error, 87. Bell v. Andrews, 4 Dall. 152. In Thompson and Tod, 1 Peters' Rep. 388. WASHINGTON, J. says, "although it should be admitted, that under all the circumstances of this case, payment of a part of the purchase money will amount to a part performance, still, it should appear beyond all reasonable doubt, that the payment was understood by the parties, to have been so made and intended."

case of lands, they meant that it should not bind in the case of lands(q).

But, even admitting that the payment of purchasemoney may be deemed a part-performance, yet the payment (\*) of the auction duty, however considerable, will not enable the Court to decree a specific performance of a parol agreement; as the revenue laws cannot be held to operate beyond their direct and immediate purpose, to affect the property and vary the rights of the parties not within the intention of the act(r).

In some cases it has been decided, that acts done by the defendant to his own prejudice, could be made a ground for compelling him to perform the agreement; but in a late case(s), Sir William Grant held the contrary, where there is no prejudice to the plaintiff, because the ground on which the Court acts, is fraud in refusing to perform, after performance by the other party(t); but where the defendant has, for instance, paid the auction duty or purchase-money, it is no fraud on the vendor, but a loss to himself, which ought not to be made a ground for a specific performance against himself.

Where a person purchases several lots of an estate, included in distinct articles of sale, a part-performance as to one lot will not be deemed a part-performance as to the other lots, and will therefore only take the agreement out of the statute as to the lot in respect of which there was a part-performance (u).

It may happen, that although an agreement be in part

<sup>(</sup>q) Clinan v. Cooke, 1 Scho. & Lef. 22; and see O'Herlihy v. Hedges, ib. 123; 14 Ves. jun. 388.

<sup>(</sup>r) Buckmaster v. Harrop, 7 Ves. jun. 341; 13 Ves. jun. 456.

<sup>(</sup>s) Buckmaster v. Harrop, ubi sup. See Hawkins v. Holmes, 1 P. Wms. 770; and see post, ch. 4, n. observations on Potter v. Potter.

<sup>(</sup>t) See Popham v. Eyre, Lofft, 786; Clinan v. Cooke, 1 Scho. & Lef. 22; and O' Herlihy v. Hedges, ibid. 123.

<sup>(</sup>u) Buckmaster v. Harrop, 7 Ves. jun. 341.

<sup>(\*125)</sup> 

performed, yet the Court may not be able to ascertain the terms, and then it seems the case will not be taken out of the statute. If, however, the terms be made out (\*)satisfactorily to the Court, contrariety of evidence is not material(x), and the Court will use its utmost endeavors to get at the terms of the agreement (76).

In the case of Mortimer v. Orchard (y), where a parol agreement with two persons had been in part performed, the plaintiff's witness proved an agreement different from that set up by the bill, and the defendants stated an agreement different from both. The Chancellor thought in strictness the bill ought to be dismissed; but as there had been an execution of some agreement between the parties, and there were two defendants who proved the agreement set up by their answers, he decreed a specific performance of the agreement confessed by the answers (77).

In one case where, upon the faith of a parol agreement, a man entered and built, it was proved that the defendant told the plaintiff that his word was as good as his bond, and promised the plaintiff a lease when he should have renewed his own from his landlord. Lord Chancellor Jefferies said, that the defendant was guilty of a fraud, and ought to be punished for it; and so decreed a lease to the plaintiff, though the terms were uncertain. It was, he said, in the plaintiff's election for

<sup>(</sup>x) See 1 Ves. 221.

<sup>(</sup>y) 2 Ves. jun. 243. See Lindsay v. Lynch, 2 Scho. & Lef. 1.

<sup>(76)</sup> See Rowton v. Rowton, 1 Hen. & Munf. 92. See also, the opinion of KENT, Chancellor, in Parkhurst v. Van Cortlandt, 1 Johns. Ch. Rep. 281. and Phillips v. Thompson, 1 Johns. Ch. Rep. 149. Abeel v. Radcliff, 13 Johns. Rep. 297.

<sup>(77)</sup> See Colson v. Thompson, 2 Wheat. 336. Neufville v. Mitchell, 1 Des. 480. Phillips v. Thompson, 1 Johns. Ch. Rep. 131. Parkhurst v. Van Cortlandt, 1 Johns. Ch. Rep. 273. Givens v. Calder, 2 Des. 188. See also, Colson v. Thompson, ut supra, note a. 341; and Morgan v. Morgan, 2 Wheat. 302., note d. (\*126)

what time he would hold it, and he elected to hold during the defendant's term at the old rent, but the *plaintiff* was to pay costs(z).

And in a case from Yorkshire, possession having been delivered in pursuance of a parol agreement, and a dispute arising upon the terms of the agreement, Lord Thurlow sent it to the Master, upon the ground of the possession being delivered, to inquire what the agreement was. The difficulty was in ascertaining what the terms were. The Master decided as well as he could, and then the (\*)cause came on before Lord Rosslyn, upon further directions, who certainly seemed to think Lord Thurlow had gone a great way, and either drove them to a compromise, or refused to go on with the decree upon the principle upon which it was made(a).

Lord Thurlow, however, appears to have formed a settled opinion upon this point. For in Allan v. Bower(b), where his Lordship considered the written memorandum as evidence of a parol agreement, which was in part performed (whether rightly or not(c) is immaterial to the present question), he directed the Master, who had refused to admit parol evidence, to inquire and state what the promise was, that was mentioned in the memorandum, and at what time the promise was made, and what interest the tenant was to acquire in the premises under such promise; and the Master was to be at liberty to state specially any particular circumstances that might arise on such inquiries, and the parties were to be examined on interrogatories. In consequence of this order, evidence was received, which proved that the tenant was to hold during his life; and Lord Thurlow decreed a lease to be executed accordingly.

<sup>(</sup>z) Anon. 5 Vin. Abr. 523, pl. 40; and see Anon. ib. 522. pl. 38.

<sup>(</sup>a) Anon. 6 Ves. jun. 470, cited by Lord Eldon.

<sup>(</sup>b) 3 Bro. C. C. 149.

<sup>(</sup>c) See 1 Sch. & Lef. 37.

<sup>(\*127)</sup> 

So in a case before Lord Redesdale, where an agreement in writing was held to be within the statute, because the term for which it was to be granted was not expressed, his Lordship said, he should have had great difficulty if there were evidence of part-performance. He must have directed a further inquiry, for the party had not suggested by his bill, that the agreement was for any specific term, and the case stood both on the pleadings and evidence imperfect on that head(d). And in a late case before Lord Eldon, he thought the Court must at least (\*)endeavor to collect, if they can, what are the terms the parties have referred to(e).

But in the case of Symondson v. Tweed(f), it was laid down, that in all cases wherever the Court had decreed a specific execution of a parol agreement, yet the same had been supported and made out by letters in writing, and the particular terms stipulated therein, as a foundation for the decree; otherwise the Court would never carry such an agreement into execution. And in a case before the late Lord Alvanley, when Master of the Rolls(g), he is reported to have said, "I admit my opinion is, that the Court has gone rather too far in permitting part-performance, and other circumstances, to take cases out of the statute, and then, unavoidably perhaps, after establishing the agreement, to admit parol evidence of the contents of that agreement. As to partperformance, it might be evidence of some agreement, but of what, it must be left to parol evidence. I always thought the Court went a great way. They ought not to have held it evidence of an unknown agreement, but to have had the money laid out repaid. It ought to have

<sup>(</sup>d) Clinan v. Cooke, 1 Scho. & Lef. 22.

<sup>(</sup>e) Boardman v. Mostyn, 6 Ves. jun. 467.

<sup>(</sup>f) Prec. Cha. 374; Gilb. Eq. Rep. 35.

<sup>(</sup>g) Forster v. Hale, 3 Ves. jun. 712, 713.

been a compensation. Those cases are very dissatisfactory. It was very right to say, the statute should not be an engine of fraud, therefore compensation would have been very proper. They have, however, gone farther, saying, it was clear that there was some agreement, and letting them prove it; but how does the circumstance of having laid out a great deal of money, prove that he is to have a lease of ninety-nine years? The common sense of the thing would have been to have let them bring an action for the money. I should pause upon such a case." And Lord Eldon has said, that perhaps if it was res (\*)integra, the soundest rule would be, that if the party leaves it uncertain, the agreement is not taken out of the statute sufficiently to admit of its being enforced.

In a late case in Ireland, where after a part-performance of a parol agreement the purchaser died, and there was no evidence of the amount of the price agreed on, or of the quantity of estate to be conveyed, Lord Manners refused to grant a reference for the purpose of ascertaining the terms of the contract. There was, his Lordship said, no evidence whatever of the terms, and the reference was sought to supply the entire absence of this very material part of the case. Where there is contradictory evidence in a case that raises a doubt in the mind of the Court; that is to say, where the case is fully proved by the party on whom the onus of proof lay, but that proof shaken or rendered doubtful by the evidence on the other side, there the Court will direct a reference or an issue to ascertain the fact; but where there is no evidence whatever, would it not, he asked, be introducing all the mischiefs intended to be guarded against by the rules of the Court, in not allowing evidence to be gone into after publication, and holding out an opportunity to a party to supply the defect by fabricated evidence, if he were to direct such an inquiry? He therefore did not think him-(\*129)

self at liberty from the evidence in the case to direct the reference or issue desired(h).

And in a later case(i), a bill for a specific performance was dismissed with costs because the agreement was by parol, and although part-performed, the terms of it could not be made out by reason of the variance between the witnesses for the plaintiff.

(\*)We cannot but observe the growing reluctance manifested to carry parol agreements into execution, on the ground of part-performance, where the terms do not distinctly appear; and although, according to many authorities, the mere circumstance of the terms not appearing, or being controverted by the parties, will not, of itself, deter the Court from taking the best measures to ascertain the real terms(j); yet the prevailing opinion requires the party seeking the specific performance in such a case to show the distinct terms and nature of the contract. We may however remark, that it rarely happens that an agreement cannot be distinctly proved where the estate is sold. Most of the cases on this head have arisen on leases, where the covenants, &c. are generally left open to future consideration.

Where a parol agreement is so far executed as to entitle either of the parties to require a specific execution of it, it will be binding on the representatives of the other party in case of his death, to the same extent as he himself was bound by it(k)(78).

In a case before Lord Redesdale (l), he held that a

- (h) Savage v. Carroll, 1 Ball & Beatty, 265. See ibid. 404, 550, 551.
  - (i) Reynolds v. Waring, 1 You. 346.
  - (j) See Savage v. Carrol, 2 Ball & Beat. 444.
  - (k) Vide infra, ch. 4.
- (1) Shannon v. Bradstreet, 1 Scho. & Lef. 52; Lowe v. Swift, 2 Ball & Beat. 529.

contract by a tenant for life with a power of leasing, to grant a lease under his power, was binding on the remainder-man. In the course of the argument, a question was put from the bar, whether, if this had been a case of a parol agreement in part performed, it could be enforced? In answer to which, Lord Redesdale expressed himself thus: "That, I think, would raise a very distinct question, a question upon the statute of frauds; and perhaps a remainder-man might be protected by the statute, though the tenant for life would not. For the (\*)party himself is bound by a part-performance of a parol agreement, principally on the ground of fraud, which is personal. Such a ground could scarcely be made to apply to the case of a remainder-man, unless money had been expended, and there had been an acquiescence after the remainder vested, which were held by Lord Hardwicke, in Stiles v. Cowper, 3 Atk. 692, in the case of an actual lease under a power, but with covenants not according to the power, to bind the remainder-man to grant a lease for the same term with covenants according to the power."

In a case where it was alleged on the one side, that under a parol agreement the purchase-money had been paid and possession delivered; and on the other, that there was no sale, but that possession was delivered to make a qualification, and the alleged purchaser was a mere agent, and both the seller and purchaser were dead; an issue was directed whether the purchaser was, at his death, beneficially entitled to the premises in question (m).

These remarks may be closed by observing, that equity seems to have been guided by nearly the same rules in compelling a specific performance of parol agreements

<sup>(</sup>m) Burkett v. Randall, 3 Mer. 466.

<sup>(\*131)</sup> 

before the statute(n), as have been adhered to since; but still, the student cannot be too cautious in distinguishing the cases which were decided before the statute from those decided subsequently. Much confusion has arisen from inattention to this point.

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## (\*) SECTION IV.

Of the Admissibility of Parol Evidence to vary or annul Written Instruments.

Or this learning we may treat under three heads, 1st, where there is not any ambiguity in the written instrument; 2dly, where there is an ambiguity; and, 3dly, where a term of an agreement is omitted or varied in the written instrument by mistake or fraud.—And,

I. Previously to the statute of frauds, parol evidence might have been given of collateral and independent facts, which tended to support a deed. Thus, although a valuable consideration was always essential to the validity of a bargain and sale, yet Rolle laid it down, that(o) upon averment that the deed was in consideration of money, or other valuable consideration given, the land should pass, because the averment was consistent with the deed. The same rule has prevailed since the statute of frauds. Where in a conveyance 28l. only were stated

<sup>(</sup>n) See Miller v. Blandist, Toth. 85; Willam v. Nevil, ibid. 135; Ferne v. Bullock, ibid. 200, 238; Clark v. Hackwell, ibid. 260; Simmons v. Cornelius, 1 Cha. Rep. 128; Anon. 2 Freem. 128; Voll v. Smith, 3 Cha. Rep. 16; and see Marquis of Normanby v. Duke of Devonshire, 2 Freem. 217.

<sup>(</sup>o) 2 Ro. Abr. 786.(N.) pl. 1; and see 1 Rep. 176, a.

to have been received, parol evidence was admitted to prove that 2l more were actually paid(p)(79). And in a later case parol evidence was received, that a sum of money was paid as a premium in order to constitute the relation of master and apprentice, although no mention of it was made in the written agreement entered into between the parties(q). In all these cases we observe, that the evidence is not offered to contradict or vary the agreement, but to ascertain an independent fact, which is consistent with the deed, and which it is necessary to (\*)ascertain, with a view to effectuate the real intention of the parties.

It is, however, clearly settled, that parol evidence is not admissible to disannul and substantially vary a written agreement; for, as Lord Hardwicke observes, to add any thing to an agreement in writing by admitting parol evidence, is not only contrary to the statute of frauds and

<sup>(</sup>p) Rex v. the Inhabitants of Scammonden, 8 Term Rep. 474.

 <sup>(</sup>q) Rex v. the Inhabitants of Laindon, 8 Term Rep. 379; and see
 2 Cha. Ca. 143; Tull v. Parlett, 1 Mood. & Malk. 472.

<sup>(79)</sup> See Davenport v. Mason, 15 Mass. Rep. 85. The fact whether the consideration expressed in the deed, was paid, or not, may be inquired into by parol evidence. Shepard v. Little, 14 Johns. Rep. 201. Bowen v. Bell, 20 Johns. Rep. 338. So, if a deed, after specifying a certain consideration, adds, "and for other considerations," parol evidence may be resorted to, to prove what those considerations were. Benedict v. Lynch, 1 Johns. Ch. Rep. 370. See Harvey v. Alexander, 1 Rand. 219. But in Schemerhorn v. Vanderheyden, 1 Johns. Rep. 139, it was held, that a different, or greater consideration, than that expressed in the written agreement, was intended cannot be proved by parol. See Church v. Church, 4 Yeates, 280.; also, Dixon v. Swiggett, 1 Har. & Johns. 252.

An acknowledgment, in the body of a deed, of the payment of the purchase-money, and a receipt indorsed for the same, not conclusive evidence of payment, nor a bar to a suit for the purchase-money. *Hamilton* v. *M'Guire*, 3 Serg. & Rawle, 355. See *Bell* v. *Andrews*, 4 Dall. 152.

perjuries, but to the rule of the common law before that statute was in being (r)(80).

Thus, in a leading case on this subject(s), it appeared that by an agreement in writing, the grass and vesture of hay from off a close of land, called Boreham's Meadow, were to be taken by one Ansell. The subscribing witness to the agreement proved the written agreement, and he and another person deposed, that it was at the same time (when the written agreement was made) agreed by the

- (r) Parteriche v. Powlet, 2 Atk. 383; and see Tinney v. Tinney, 3 Atk. 8; Binstead v. Coleman, Bunb. 65; Hogg v. Snaith, 1 Taunt. 347.
- (s) Meres v. Ansell, 3 Wils. 275; and see Mease v. Mease, Cowp. 47; Lofft, 457; Cuff v. Penn, 1 Mau. & Selw. 21; Greaves v. Ashlin, 3 Campb. 426; Hope v. Atkins, 1 Price, 143.

<sup>(80)</sup> This principle is also well settled in most of the United States. Richards v. Killam, 10 Mass. Rep. 239, 244. Stevens v. Cooper, 1 Johns. Ch. Rep. 425. Jackson v. Sill, 11 Johns. Rep. 201. Paine v. M'Intier, 1 Mass. Rep. 69. Revere v. Leonard, 1 Mass. Rep. 91. Storer v. Freeman, 6 Mass. Rep. 435. Stackpole v. Arnold, 11 Mass. Rep. 27. Dwight v. Pomeroy, 17 Mass. Rep. 303. Thompson v. White, 1 Dall. 426. O'Harra v. Hall, 4 Dall. 340. M'Dermot v. U. S. Ins. Co. 3 Serg. & Rawle, 609. Speake v. United States, 9 Cranch, 28, 37. Pierson v. Hooker, 3 Johns. Rep. 68. Howes v. Barker, 3 Johns. Rep. 506. Jackson v. Croy, 12 Johns. Rep. 427. Thompson v. Ketchum, 8 Johns. Rep. 146. 2d edit. Fitzhugh v. Runyon, 8 Johns. Rep. 292. 2d edit. Movan v. Hays, 1 Johns. Ch. Rep. 339. Stevens v. Cooper, 1 Johns. Ch. Rep. 425. Snyder v. Snyder, 6 Binn. 483. Lee v. Biddis, 1 Yeates, 8. Vandervoort v. Smith, 2 Caines' Rep. 155. Hamilton v. Cawood, 3 Har. & M'Hen. 437. Dupree v. M'Donald, 4 Des. 209. Barret v. Barret, 4 Des. 447. Sessions v. Barfield, 2 Bay, 94. Milling v. Crankfield, 1 M'Cord, 261. South Carolina Society v. Johnson, 1 M'Cord, 41. Jackson v. Bowen, 1 Caines' Rep. 358. Ross v. Norvell, 1 Wash. 14. Flemings v. Willis, 2 Call, 5. But see Baker v. Glascock's Les. 1 Hen. & Munf. 177. Mann v. Mann, 1 Johns. Ch. Rep. 231. Herd v. Bissell, 1 Root, 260. Dunham v. Baker, 2 Day, 137. See Treadwell v. Bulkley, 4 Day, 395.; Smith v. Fenner, 1 Gallis. 170. Holmes v. Simons, 3 Des. 149, 152. Little v. Henderson, 2 Yeates, 295.

parties by parol, that Ansell should not only have the hay from off Boreham Meadow, but also the possession of the soil and produce of that and another close of land. The cause was tried at nisi prius before Lord Mansfield, who admitted the evidence, and afterwards reported that he was not dissatisfied with the verdict in consequence of it. But Lord Chief Justice De Grey, and the other Jüdges of the Court of Common Pleas, held decidedly, that the evidence was totally inadmissible, as it annulled and substantially altered and impugned the written agreement (81).

(81) A vendor of land in several lots was unable to give a title to one, whereupon the vendee agreed by parol to waive the title as to that lot. This agreement cannot be set up against the original contract in writing. The judgment contains many observations on the power of varying contracts in writing, by subsequent parol agreements, and a distinction between contracts in writing under the statute of frauds and other contracts in writing. Parke, J. stated that he never could understand the principle upon which Cuff v. Penn, 1 M. & S. 21. and similar cases preceded. Goss v. Lord Nugent, 5 B. & Ad. 58; 3 Nev. & Man. 28. S. C.

It is true as a general rule that any verbal agreement before the making of the writing is not to be received in evidence; but the writing alone is to be looked to as the evidence of the final agreement. Gerrish v. Washburn, 9 Pick. 338, where the defendants gave an accountable receipt for money received of the plaintiffs; and this action being brought to recover the money, the defendants at the trial offered to prove, that before the execution of the receipt, the plaintiff being indebted to one W.; and the latter indebted to the defendants, agreed that the latter might arrange the payment of the money mentioned in the receipt with W.: And that the receipt was made in execution of the contract :- but the Judge rejected the evidence. The whole Court granted a new trial; and held that it was admissible; for the writing was neither a promissory note, nor a mere receipt. "We view it, said the chief justice, in neither of these lights, or rather in both. The promise made in the receipt may be performed otherwise than by paying over the money to the plaintiff, and in any way conformable to the intention of the parties."

The maxim that a sealed contract cannot be avoided or waived but by an instrument of a like nature; or generally, that a contract under So in Preston v. Merceau(t), by an agreement in writing a house was let at 26l. a year; and the landlord attempted

#### (1) 2 Blackst. 1249.

seal cannot be avoided or altered or explained by parol evidence, like other maxims has received qualifications, and indeed was never true to the letter, for at all times, a bond, covenant or other sealed instrument might be defeated by parol evidence of payment, accord and satisfaction, &c. Therefore, in Munroe v. Perkins, 9 Pick. 298. where the action was assumpsit, for work, materials, &c. done and furnished by the plaintiff for the defendant. The defence set up was, that the work was done and the materials were furnished on a special contract under seal made by the defendant and Payne on behalf of themselves and other subscribers to the building; and such a contract was produced in evidence. The plaintiff showed that being unable to go on with the contract without loss, defendants promised him to make him whole; and upon this assurance the work was done without regard to the special contract. The Court held, that the plaintiff was entitled to recover. "The parol promise, it is contended, was without consideration. This depends entirely on the question, whether the first contract was waived. The plaintiff having refused to perform the contract, as he might do, subjecting himself to such damages as the other parties might show they were entitled to recover, he afterwards went upon the faith of the new promise and finished the work. This was a sufficient consideration. If the defendants were willing to accept his relinquishment of the old contract, the law we think will not prevent it."

So in Lattimore et al v. Harsen, 14 Johns. R. 330, where the plaintiffs had stipulated to perform certain work for a stipulated sum, under a penalty. Having entered upon the performance of it, they refused to perform, whereupon the defendant, by parol, released them from their covenant, and promised, if they would complete the work, to pay them by the day. The Court held the new contract to be binding. This doctrine was also recognized in the subsequent case of Dearborn v. Cross, 7 Cowen, 48, where a parol agreement executed was held to discharge a bond or other specialty. The cases of Fleming v. Gilbert, 3 Johns. 358; Keating v. Price, 1 J. Cas. 22; Edwin v. Saunders, 1 Cowen, 250. In Ballard v. Walker, 3 J. Cas. 64, lapse of time alone was held to be a waiver of the contract.

Where there is an agreement in writing, it merges all parol agreements and previous conversations; but there are many cases we have seen in which a new parol contract is admitted to be proved. And there is a distinction between a suit upon the written contract itself, in

(\*)to show, by parol evidence, that the tenant had agreed to pay the ground-rent for the house to the original landlord, over and above the 26l. a year; but the Court of Common Pleas rejected the evidence.

And upon the general rule of law, as it seems, independently of the statute of frauds, it has been determined that verbal declarations by an auctioneer in the auctionroom, contrary to the printed conditions of sale, are inadmissible as evidence, (82) unless perhaps the purchaser has particular personal information given him of the mistake in the particulars (u).

In a late case(v), upon the sale of timber by a written particular, which was silent as to the quantity, it was attempted to show, that the auctioneer verbally warranted the quantity to be eighty tons, and it was insisted that this evidence was admissible, because it did not contradict the particular, but merely supplied its defect in not

<sup>(</sup>u) Gunnis v. Erhart, 1 H. Blackst. 289. See 13 Ves. jun. 471. and infra; and Fife v. Clayton, 13 Ves. jun. 546; Higginson v. Clowes, 15 Ves. jun. 516.

<sup>(</sup>v) Powell v. Edmunds, 12 East, 6; Jones v. Edney, 3 Camb. 285.

which case it has been held that parol evidence shall not be received: and a suit brought on the ground of a new subsequent agreement not in writing: in the latter case parol evidence is admitted. Duncan, J. in Le Fevre v. Le Fevre, 4 S. & R. 241. said "a party may be admitted to prove by parol evidence, that after signing a written agreement, the parties made a verbal agreement, varying the former, provided their variations have been acted upon, and the original agreement can no longer be enforced without a fraud on one party." Parol evidence was admitted in that case to prove an alteration of the course of an aqueduct established by deed. The evidence was not offered for the purpose of contradicting the deed, but to show a substitution of another spot. And as was well remarked by the learned Judge, "if this had not been carried into effect, the evidence would not have been admissible; but where the situation of the parties is altered, by acting upon the new agreement, the evidence is proper."

<sup>(82)</sup> See Wright's Les. v. Deklyne, 1 Peters' Rep. 199, 204. See also, Wainwright v. Read, 1 Des. 573.

<sup>(\*134)</sup> 

stating the quantity. But it was held that the evidence was not admissible (83). Lord Ellenborough said, that the purchaser ought to have had it reduced into writing at the time, if the representation then made as to the quantity swayed him to bid for the lot. If the parol evidence were admissible in this case, he knew of no instance where a party might not, by parol testimony, superadd any term to a written agreement, which would be setting aside all written contracts, and rendering them of no effect. There was no doubt, his Lordship added, that the warranty as to the quantity of timber would not vary the agreement contained in the written conditions of sale.

So, since the act of parliament for altering the style, a demise from Michaelmas must be taken to be from (\*)new Michaelmas, and parol evidence cannot be admitted to show that the parties intended it to commence at old Michaelmas(x), unless the demise is by parol(y).

The rules of evidence are universally the same in courts of law and equity. Therefore parol evidence, which goes to substantially alter a written agreement, cannot be received in a court of equity any more than in a court of law(z)(84).

- (x) Doe v. Lea, 11 East, 312.
- (y) Doe v. Benson, 4 Barn. & Ald. 588.
- (z) See 3 Wils. 276; and see Foot v. Salway, 2 Cha. Ca. 142.

<sup>(83)</sup> See Wright's Les. v. Deklyne, 1 Peters' Rep. 199, 204. See also Wainwright v. Read, 1 Des. 573.

<sup>(84)</sup> See Dwight v. Pomeroy, 17 Mass. Rep. 303. Movan v. Hays,
1 Johns. Ch. Rep. 443, Per KENT, Chancellor. Holmes v. Simons,
3 Des. 149, 152. Dupree v. M'Donald, 4 Des. 209.

<sup>&</sup>quot;Indeed it would be strange that, in any country, there should be independent tribunals, having jurisdiction over the same subject matter, which should act upon such different principles, as that a contract should be valid in one and void in the other. One may have forms and processes to enforce a contract, which the other may want; but it would seem impossible that the contract itself should be valid or invalid, according to the form in which it should be discussed. But were it otherwise in England, or in New York, as some of the cases tend to vol. 1.

Thus in the case of Lawson v. Laude(a), a bill was brought to carry into execution an agreement between the plaintiff and defendant, for granting to the defendant a lease of a farm. The defendant objected to execute the lease, because some land, called Oxlane, agreed to be demised, was left out of the lease. The plaintiff offered evidence to prove, that it was left out by the particular and joint direction of the plaintiff and defendant. Sir Thomas Clarke held the evidence to be in direct contradiction to the stutute of frauds, and therefore dismissed the bill.

So in a case before Lord Bathurst(b), the bill was filed for an injunction to stay proceedings at law for a breach of covenant, in not assigning all the premises, which the defendant insisted, by an agreement in writing, and a lease in pursuance of it, were to be assigned. The plaintiff stated by his bill, that though the agreement was for all the premises, yet the defendant, at the time of the execution of the lease, agreed that three pieces of land should be excepted, and the plaintiff examined several witnesses to prove the fact, which they did; but the defendant by his answer denied the fact, and insisted (\*)upon the extent of the written agreement; and the

(a) 1 Dick. 346.

(b) Fell v. Chamberlain, 2 Dick. 484. I could not meet with the facts in the Registrar's book; see Reg. Lib. A. 1772, fol. 1. 496.

shew (2 J. Ch. R. 585; 7 Johns. 373.) it would by no means follow that, in this commonwealth, the same doctrine would be received." (Per Parker C. J. in Dwight v. Pomeroy.) He added, "there are but two cases, in which parol evidence can be admitted, to control the effect of a deed or written contract, in itself complete and intelligible. One is fraud, of which the injured part may avail himself at law as well as in equity; and the other is where application is made in equity to enforce a written contract; the adverse party in the latter case may show that the instrument relied on does not contain the true agreement of the parties, or the whole of it. In the latter case equity may refuse the exercise of its powers, unless justice is done to the other party.

parol evidence being objected to at the hearing, it was not permitted to be read.

And in an important case before Lord Eldon(c), his Lordship refused to execute an agreement with a variation attempted to be introduced by parol, on the ground of mistake, or at least of surprise, which was denied by the answer. So in the late case of Woollam v. Hearn(d), where a specific performance was sought of an agreement for a lease, at a less rent than that mentioned in the agreement, which variation was introduced by parol, on the ground of fraud and misrepresentation in the landlord; the evidence was read without prejudice, and the Master of the Rolls thought it made out the plaintiff's case; but his Honor held himself bound by the authorities, and accordingly rejected the evidence, and dismissed the bill. And this doctrine has been distinctly recognized by Lord Redesdale(e).

So verbal declarations, in opposition to printed conditions of sale, are inadmissible as evidence in equity as well as at law(f).

And if a material term be added by one party to a written agreement after its execution, he destroys his own rights under the instrument. But although this doctrine has been referred to the statute of frauds, yet it seems rather to depend on the principles of the common law(g).

In the late case of Besant v. Richards(h), where the

<sup>(</sup>c) Marquis of Townshend v. Stangroom, 6 Ves. jun. 328. See 1 Ves. & Bea. 526, 527.

<sup>(</sup>d) 7 Ves. jun. 211.

<sup>(</sup>e) 1 Scho. & Lef. 39.

<sup>(</sup>f) Jenkinson v. Pepys, 6 Ves. jun. 330, cited; 15 Ves. jun. 521;
1 Ves. & Bea. 528; see 15 Ves. jun. 171, 546; Higginson v. Clowes,
15 Ves. jun. 516.

<sup>(</sup>g) Powell v. Divett, 15 East, 29.

<sup>(</sup>h) 1 Tomlyn 509.

purchaser was plaintiff, the contract described the property (\*) as held by one Watson, and the sale was to be completed at Michaelmas. Watson held an agreement for a lease for ten years, but the seller represented to the purchaser that this agreement was void, and that he had served Watson with notice to quit at Michaelmas, and that he would give possession at that time. The tenant refused to quit, and the Master of the Rolls held that the purchaser ought not to be bound by the agreement, purchasing as he did on the faith of that representation. He was entitled to be released from the agreement altogether, or if he chose he might perform it and have compensation, and the plaintiff electing to perform the agreement with a compensation, a decree was made accordingly; but it seems difficult to sustain this decision consistently with the authorities, although there might have been sufficient ground to have released the purchaser altogether.

But when equity is called upon to exercise its peculiar jurisdiction, by decreeing a specific performance, the party to be charged is to be let in to show, that, under the circumstances, the plaintiff is not entitled to have the agreement specifically performed (i)(85).

Therefore a defendant resisting a specific performance of an agreement, may prove by parol evidence, that by fraud the written agreement does not contain the real terms (j). Such evidence was admitted by Lord Hard-

(\*137)

<sup>(</sup>i) See 7 Ves. jun. 219.

<sup>(</sup>j) See the cases cited infra, as to discharging or varying a written agreement by parol; and see Walker v. Walker, 2 Atk. 98; and see 6 Ves. jun. 334, n.

<sup>(85)</sup> See Stevens v. Cooper, 1 Johns. Ch. Rep. 425. Botsford v. Burr, 2 Johns. Ch. Rep. 405. Gillespie v. Moon, 2 Johns. Ch. Rep. 585. In Maryland, it has been determined, in an action at law, on a bond for the purchase-money of lands, that parol evidence cannot be given by a witness, to shew, that he was seized of part of the lands sold, in order to rebut the claim of the vendor. Sharpe v. Gibson, 1 Har. & Johns. 447.

wicke in Joynes v. Statham(k); and in the case of Woollam v. Hearn(l), before cited, the Master of the Rolls said, that if it had been a bill brought by the defendant for a specific performance, he should have been (\*)bound by the decisions to admit the parol evidence, and to refuse a specific performance.

So Lord Hardwicke admitted, that an omission by mistake or surprise, would let in the evidence as well as fraud; and Lord Eldon actually admitted parol evidence of surprise, as a defence to a bill seeking a performance in specie; but his Lordship said, that those producing evidence of mistake or surprise, in opposition to a specific performance, undertake a case of great difficulty(m). In a later case, the Master of the Rolls admitted parol evidence on behalf of a defendant, to show a parol promise at the time of signing the agreement to vary the terms of it, and upon the evidence he dismissed the bill for a specific performance of the written agreement(n)(86).

- (k) 3 Atk. 338.
- (l) 7 Ves. jun. 211.
- (m) Marquis of Townshend v. Stangroom, 6 Ves. jun. 328.
- (n) Clarke v. Grant, 14 Ves. jun. 519; and see 15 Ves. jun. 523.

The expression 'deed of conveyance' was, it seems, explained by parol evidence to mean, when inserted in articles of agreement, "a deed conveying the land free of all incumbrances." Subsequent decisions, however, consider the correctness of this decision doubtful. The case of Zantinger v. Ketch, 4 Dall. R. 132. therefore, in which the decision was had, if not overruled, is certainly opposed to the rule that

<sup>(86)</sup> Parol evidence collateral to an agreement is admissible: but no evidence of matter dehors was admissible to alter the terms and substance of the contract. In Clarke v. Grant, 14 Ves. 510, the parol evidence admitted was of a stipulation entered into by the defendant prior to, and as a condition precedent to the execution of the agreement: and it did not seek to vary the substance of the agreement: Here the purpose of the parol evidence was to show the transaction conducted on the basis of an exchange. Croome v. Lediard, 2 M. & R. Ch. R. 261.

And where lands, which upon admeasurement did not contain thirty-six acres, were described in a particular to contain forty-one acres by estimation, were the same more or less, and the purchaser in answer to a bill for a specific performance set up parol declarations of the auctioneer that he sold it for forty-one acres, and if it was less an abatement should be made, his Honor admitted the evidence and dismissed the bill, because after such a declaration made by the auctioneer, it was fraudulent and unfair in the seller to insist upon the execution of the contract, not giving the defendant the benefit of that declaration(o).

So where by the *mistake* of the solicitor the agreement only required the purchaser to bear the expense of the conveyance, whereas the real agreement was, that he should also bear the expense of making out the title, the Master of the Rolls admitted parol evidence of the real agreement and of the mistake(87); and upon the strength of (\*)it, his Honor gave the plaintiff, the purchaser, his option to have his bill, which was for a specific performance according to the terms of the written agreement, dismissed, or to have the agreement performed in the way contended for by the seller (p).

- (o) Winch v. Winchester, 1 Ves. & Beam. 375.
- (p) Ramsbottom v. Gosden, 1 Ves. & Beam. 165. See Flood v.

<sup>&#</sup>x27;where the construction is on the construction of words, qua words, no parol evidence can be admitted.' 4 Dall. 340; 3 S. & R. 609.

<sup>(87)</sup> See Gillespie v. Moon, 2 Johns. Ch. Rep. 585. Chapman v. Allen, Kirby, 399. Elmore v. Austin, 2 Root, 415. Washburn v. Merrills, 1 Day, 139. Matson v. Parkhurst, 1 Root, 404. Cook v. Preston, 2 Root, 78. In Christ v. Deffeback, 1 Serg. & Rawle, 465, TILGHMAN, Ch. J. said, "It may be laid down as settled law, that parol evidence is admissible in cases of fraud and of plain mistake in drawing a writing." In South Carolina, it has been decided that the scrivener who drew articles of a marriage settlement, could not be allowed to testify, that the object or intention of the deed, was different from that which appeared on its face. Dupree v. M'Donald, 4 Des. 209. The same principle was recognized in Rothmahler v. Myers, 4 Des. 215.

But in a case where a written agreement for a lease had been varied in part by parol, upon a bill filed by the tenant for a specific performance of the original agreement, the landlord set up a parol waver of the written agreement, and a new agreement entered into at his solicitor's, every term of which was to the disadvantage of the plaintiff, without any consideration for the variation; the Master of the Rolls decreed a specific performance according to the prayer of the bill. His Honor considered the case made out by the landlord(q) not a waver of the contract, but a variation by parol which had not been acted upon, and which was made without consideration. The first parol variation, it may be observed, was admitted, and the plaintiff would have been willing to execute it.

And in a case where an estate was sold in lots, and at the end of some of the lots only it was stated that the timber was to be taken at a valuation, but there was a general condition that the timber should be paid for; the seller's bill for a specific performance, requiring the purchaser of several lots to pay for all the timber, was dismissed, and parol evidence of the declaration of the auctioneer that the timber on all the lots was to be paid for, was rejected. The purchaser then filed a bill against the seller for a specific performance, according to his construction that he was to pay for the timber on the lots only to which (\*)a stipulation to that effect was added. The seller, as defendant, offered parol evidence of the declaration by the auctioneer. The Vice-Chancellor agreed that fraud, mistake or surprise, would let in the evidence as a defence; but no authority having decided that evidence can be received, except upon one of those grounds, and these dec-

Finlay, 2 Ball & Beatty, 9; Lord William Gordon v. Marquis of Hertford, 2 Madd. 106; Garrard v. Girling, 1 Wils. Ch. Cas. 460; 1 Swanst. 244.

<sup>(</sup>q) Price v. Dyer, MS.; S. C. 17 Ves. jun. 356; Robinson v. Page, 3 Russ. 114.

larations in the case before his Honor being offered where the parties had contracted in writing upon a subject distinctly adverted to in their written contract, which made a provision for it (whether explicit and satisfactory is not material), the evidence of these declarations must be rejected, because there was no fraud, mistake, or surprise, and the evidence was offered to contradict, explain, or vary the written contract(r). It was not, however, necessary to decide the point; and it may deserve reconsideration whether the evidence might not be deemed admissible in equity as a defence, simply on the ground that the plaintiff, who ought to come into equity with clean hands, sought to commit a fraud in evading to pay for the timber, although the auctioneer declared that it was to be paid for.

The case before Lord Eldon(s) shows the rule of equity in a strong light. The landlord filed a bill for a specific performance of the written agreement, varied by the parol evidence; the tenant filed a cross-bill for a specific performance of the written agreement. The result was, that both bills were dismissed; the first, because parol evidence was not admissible as a foundation for a decree enforcing a specific performance; the second, on the ground that such evidence was admissible to rebut the equity of the

plaintiff in the second bill.

A similar case appears to have been decided by Lord Chancellor Macclesfield. The case has, I believe, never (\*)been cited, and it requires some attention to get at the facts. They appear, however, to be, that the plaintiff in the first bill sought a specific performance of an agreement by him to grant a lease to the defendant. The defendant set up a parol agreement, by which he was to have liberty to grub bushes, and exhibited a cross-bill

<sup>(</sup>r) Clowes v. Higginson, 1 Ves. & Bea. 524.

<sup>(</sup>s) Lord Townshend v. Stangroom.

<sup>(\*141)</sup> 

for a performance in specie of the written agreement, with the addition of a clause to grub bushes according to the parol agreement, and both the bills were dismissed, but without costs(t).

Upon the admissibility of parol evidence, as a defence to a bill seeking a specific performance, Lord Redesdale has forcibly observed, that it should be recollected what are the words of the statute: "No person shall be charged upon any contract or sale of lands, unless the agreement, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." No person shall be charged with the execution of an agree-ment who has not, either by himself or his agent, signed a written agreement; but the statute does not say, that if a written agreement is signed, the same exception shall not hold to it that did before the statute. Now, before the statute, if a bill had been brought for specific performance, and it had appeared that the agreement had been prepared contrary to the intent of the defendant, he might have said, "That is not the agreement meant to have been signed." Such a case is left as it was by the statute: it does not say, that a written agreement shall bind, but that an unwritten agreement shall not bind(u). nearly the same observations upon the negative words of the statute, were made by the Lord Chief Baron Skinner, in the great case of Rann and Hughes(x).

(\*)But if parties enter into an agreement which is correctly reduced into writing, and at the same time add a term by parol, equity cannot look out of the agreement, although the person insisting upon the parol agreement

<sup>(</sup>t) Hosier r. Read, 9 Mod. 86. I have searched the Register's books for this case without success.

<sup>(</sup>u) 1 Scho. & Lef. Rep. 39.

<sup>(</sup>x) 7 Term Rep. 350, n.

is a defendant, and sets it up as a bar to the aid of the Court in favor of the plaintiff.

Thus, in Omerod v. Hardman(y), the vendor filed a bill for a specific performance. It was not mentioned in the written agreement at what time the purchaser was to take possession of the estate; but the purchaser, the defendant, offered parol evidence to show that it was at the same time agreed, though not made part of the written agreement, that he should be let into possession at a stated time; and he resisted a performance of the agreement, on the ground of possession not having been delivered to him according to the parol agreement. Mr. Justice Chambre objected to the evidence being read. He said, that it was urged for the defendant, that evidence may be read where the parol agreement is not inconsistent with the written agreement. This, (that is, the parol agreement, in the case before him,) he added, was to further the written agreement, and to secure what was through carelessness omitted to be provided for in the written agreement, viz. delivery of possession, according to the custom of the country. Mr. Baron Graham said, that the parol agreement could only be admitted where the written agreement was not drawn according to the intention of the parties at the time. You cannot by parol add any thing to what was the real agreement at the time, after that has been correctly reduced into writing. And he entirely agreed with Mr. Justice Chambre, that the parol could not be made to form part of the written agreement(88).

## (y) 5 Ves. jun. 722.

<sup>(88)</sup> See Thompson v. Ketcham, 8 Johns Rep. 146. 2d edit. Fitzhugh v. Runyon, 8 Johns. Rep. 292. 2d edit. Stackpole v. Arnold, 11 Mass. Rep. 27. Movan v. Hays, 1 Johns. Ch. Rep. 339. Stevens v. Cooper, 1 Johns. Ch. Rep. 425. Snyder v. Snyder, 6 Binn. 483. Streator v. Jones, 1 Murphy, 449. Smith v. Williams, 1 Murphy, 426. S. C. 1 Car. Law Rep. 263. Dickerson v. Dickerson, 1 Car. Law

Lord Hardwicke is reported(z) to have said, that (\*)a plaintiff seeking a specific performance might enter into parol evidence to show that the defendant was to pay the rent clear of taxes, no mention being made of taxes in the agreement; because it was an agreement executory only, and as, in leases, there were always covenants relating to taxes, the Master would inquire what the agreement was as to taxes, and therefore the proof would not be a variation of the agreement. And this extra-judicial opinion appears to have been approved of by two enlightened Judges(a), one of whom(b) laid it down, that parol evidence was admissible to prove collateral matters, concerning which nothing was said in the agreement, as who was to put the house in repair, or the like.

But notwithstanding these dicta, it has been expressly decided, that parol evidence of even collateral matters, such as the payment of taxes, &c. which are of the essence of the agreement, is inadmissible both at law and

Rep. 262. Sessions v. Barfield, 2 Bay, 94. Jackson v. Sill, 11 Johns. Rep. 201.

In Stackpole v. Arnold, it was decided that want of consideration in a promissory note might be shown by parol. This seems prima facie repugnant to the general rule respecting written contracts; but upon examination of the cases in which the evidence has been admitted it will appear that they all rest upon fraud, or upon a failure of the consideration, or upon some illegality in the transaction; all of which may be proved without explaining or varying the terms of the contract. In Bowers v. Hurd, 10 Mass. 427, it is stated, that to a promissory note, in which value is acknowledged to have been received, it cannot be objected in deference, between the original parties, that there was in fact no consideration. But in subsequent cases, the same court have considered that opinion as untenable. Hill v. Buckminster, 5 Pick. 391; S. P. 6 ib. 427.

<sup>(</sup>z) 3 Atk. 389, 390; but see 4 Bro. C. C. 518; 6 Ves. jun. 335.
n. 1 Scho. & Lef. Rep. 38.

<sup>(</sup>a) See 2 Blackst. 1250; 7 Ves. jun. 221.

<sup>(</sup>b) Mr. Justice Blackstone.

in equity. Thus, in Rich v. Jackson(c), it appeared that William Stiles and William Jackson entered into a treaty for the lease of a house belonging to Stiles, and in a conversation between them on the subject, Jackson offered 801. a year rent, and that he would pay all the taxes, which Stiles agreed to accept. An agreement was drawn up by Jackson, in his own hand-writing, in which no notice was taken of taxes. Rich, who claimed under Stiles, refused to execute a lease unless the rent was made payable clear of taxes, and Jackson, the defendant, who claimed under William Jackson, refused to accept such a lease. Jackson having paid some money for landtax, brought an action in the Court of Common Pleas for (\*) the recovery of it, the plaintiff having refused to deduct it in the payment of the rent. The cause was tried at Guildhall, before Lord Rosslyn, then Lord Chief Justice of the Common Pleas. The defendant was suffered to give parol evidence of the real agreement, and his Lordship gave credit to the veracity of the witnesses, notwithstanding which he rejected the evidence, and directed a verdict to be given for Jackson, with costs; and, upon an application to the Court of Common Pleas, the Court approved of the verdict, and refused a rule to show cause why the same should not be set aside(89).

In this branch of the case, therefore, the point was

<sup>(</sup>c) 4 Bro. C. C. 514; 6 Ves. jun. 334, n.

<sup>(89)</sup> See Parkhust v. Van Cortlandt, 1 Johns. Ch. Rep. 273. S. C. on appeal, 14 Johns. Rep. 15. Gilpins v. Consequa, 1 Peters' Rep. 85, 87. O'Hara v. Hall, 4 Dall. 340. Wolf v. Carothers, 3 Serg. & Rawle, 240. Wallace v. Baker, 1 Binn. 610. And see M'Kinney v. Leacock, 1 Serg. & Rawle, 27. Marshall v. Sprott, Addis. 361. Bruce v. Barber, 3 Conn. Rep. 9. But the rule of law, that all previous negotiations are merged in the written contract, applies only to the parties to the deed. Strong v. Glascow, 1 Cor. Law. Rep. 279. Hawkins v. Hawkins, Id. 496. See also, Lewis v. Gray, 1 Mass. Rep. 297.

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solemnly decided in a court of law, and the same determination was afterwards made upon the same case in a court of equity. Rich being defeated at law, filed his bill for a specific performance of the agreement, varied by the parol evidence; and the cause came on to be heard before Lord Rosslyn, then Lord Chancellor, who said, that the prior conversations, and the manner of drawing up the agreement by one party, and signing it by another, would have no influence. The real question was, whether in equity, any more than at law, the evidence ought to be admitted; whether there is any distinction in a court of equity, where a party comes to enforce a written agreement by obtaining a more formal instrument, and to add, in doing that, a term not expressed in the written agreement, and of such a nature as to bear against the written agreement. He had looked into all the cases, and could not find that the Court had ever taken upon itself, in executing a written agreement by a specific performance, to add to it by any circumstance that parol evidence could introduce. And he accordingly dismissed the bill, but without costs.

Indeed Lord Rosslyn appears to have made a similar (\*)decision in a case prior to that of Rich v. Jackson. The case to which I allude is Jordan v. Sawkins(d); where a bill was filed for a specific performance of a lease, and it was stated, that there was a memorandum annexed to the original agreement, that the tenant(I) was to pay the land-tax (which, it must be presumed, was not signed, and was therefore only tantamount to a parol agreement). The cause was heard before the Lords Commissioners

<sup>(</sup>d) Jordan v. Sawkins, 3 Bro. C. C. 388; 1 Ves. jun. 402; and see O'Connor v. Spaight, 1 Scho. & Lef. 305; and see the cases infra, as to the discharge of a parol agreement.

<sup>(</sup>I) In the Report, the name of the landlord is, by mistake, printed for that of the tenant.

Eyre, Ashhurst, and Wilson, who decreed a performance of the contract with the variation, that it was to be at a clear rent of 401. without deducting land-tax. The cause was re-heard before Lord Rosslyn, who said, that if the agreement had been carried into execution as it originally stood, the landlord must have paid the land-tax. The Court could not specifically perform an agreement with a variation, and he therefore reversed the decree, and dismissed the bill.

As a term agreed upon by parol cannot be added to a written agreement, by a parity of reason a written agreement cannot be *varied* by parol(90).

This was decided by Lord Thurlow in a branch of the last-mentioned case(e). It appeared that a lease was agreed, by writing, to be granted of a house for twenty-one years, to commence from the 21st of April 1791, and that it was afterwards agreed by parol, that the lease should commence on the 24th of June instead of the 21st of April. To a bill filed by the tenant for a specific performance of the written agreement, varied by the parol

## (e) See 7 Ves. jun. 133.

<sup>(90)</sup> See Stevens v. Cooper, 1 Johns. Ch. Rep. 425. M'Teer v. Sheppard, 1 Bay, 461. Dickerson v. Dickerson, 1 Car. Law Rep. 262. See also, Fleming v. Gilbert, 3 Johns. Rep. 528. Keating v. Price, 1 Johns. Cas. 22. Hasbrouck v. Tappen, 15 Johns. Rep. 200. Dwight v. Pomeroy, 17 Mass. Rep. 303, 325.

An alteration or addition in a deed, without the consent of parties, will render it void; but if an erasure be made, as by striking out an old obligor, and adding a new one, by consent of all parties, this does not, of itself, avoid the deed; whether the alteration or erasure be made prior or subsequent to the execution of the deed; and such consent may be proved by parol: And parol evidence will be let in to shew whether an erasure or interlineation on the face of a deed, has been made under such circumstances as the law will, or will not justify. Speake v. United States, 9 Cranch, 28, 37. LIVINGSTON, J., dissenting. Parol evidence not admissible to shew an erasure or alteration in the entrybook of the surveyor general. Kerr v. Porter, 1 Ten. Rep. 15.

agreement, the statute of frauds was pleaded, and Lord (\*)Chancellor Thurlow held, that the different period of commencing the lease made a material variation, as it gave the estate from the owner for so many months longer, and therefore he allowed the plea.

The rule of the law is, nihil tam conveniens est naturali æquitati, unumquodque dissolvi eo ligamine quo ligatum est: and therefore, in general, as we have seen, an agreement in writing cannot be controlled by averment of the parties, as it would be dangerous to admit such nude averments against matter in writing (f). This was an imperative rule, previously to the statute of frauds; and the statute required that "all agreements upon any contract or sale of lands, &c. should be in writing." Now, as Lord Hardwicke observed, an agreement to wave a purchase contract, is as much an agreement concerning lands as the original contract(g); notwithstanding which, it is universally considered, that an agreement in writing concerning land may be discharged, although it cannot be varied by parol(h). And in a late case, where all the authorities were mentioned, but in which it was not necessary to decide the point(i), the Master of the Rolls appeared to consider that a written agreement might be abandoned by parol(91).

<sup>(</sup>f) Countess of Rutland's case, 5 Co. 25 b; Blemerhasset v. Pierson, 3 Lev. 234.

<sup>(</sup>g) 2 Eq. Ca. Abr. 33.

<sup>(</sup>h) 1 Ves. jun. 404; 4 Bro. C. C. 519; 6 Ves. jun. 337, n.; 9 Ves. jun. 250; 3 Wooddes. 428, s. iv.; Rob. on Stat. of Frauds, 89; and Inge v. Lippingwell, 2 Dick. 469; but see Kaye v. Waghorn, 1 Taunt. 428.

<sup>(</sup>i) Price v. Dyer, MS. Rolls; S. C. 17 Ves. jun. 356, post.

<sup>(91)</sup> Where lands have been sold and conveyed, and the parties, afterwards, agree by parol, to rescind the contract, and the conveyances were given up in pursuance of such agreement, but by accident, the

The first case on this head, is a short note in Vernon(k), where the precise point occurred, and the Lord Keeper held, that the agreement might be discharged by parol, (\*) and therefore dismissed the bill, which was brought to have the agreement executed in specie. The next case is reported by Viner(l): A. leased a house to B. for eleven years, and was to allow 201. to be laid out in repairs; the agreement was reduced into writing, and signed and sealed by both parties. B. repaired the house, and finding it to take a much greater sum than the 201., told A. of it, and that he would nevertheless go on and lay out more money if he would enlarge the term to twenty-one years, or add fourteen, or as many as B. should think fit. A. replied, that they would not fall out about that, and afterwards declared that he would enlarge the term, without mentioning the term in certain. The question was, whether this new agreement, made by parol, which varied from the written agreement, should be carried into execution, notwithstanding the statute of frauds. The Master of the Rolls said, that before the statute, a written agreement could not be controlled by a parol agreement, contrary to it, or altering it; but this

(k) Gorman v. Salisbury, 1 Vern. 240. I could not discover any trace of this cause in the Register's book.

(l) Anon. 5 Vin. 522, pl. 38; 4 Geo.

notes for the purchase money, were not given up; it was held, in an action on the notes, that parol evidence of the rescission of the contract, was not admissible, at law. Sably v. Sandifie, 2 Rep. Con. Ct. 445. The same principle was recognized in Botsford and Morehouse, 4 Conn. Rep. 550.

See Stevens v. Cooper, 1 Johns. Ch. Rep. 429, 430. The Chancellor, in giving his opinion in this case, remarking upon the principle that an agreement in writing concerning lands, may be discharged by parol, says, that "the evidence in such cases is good only as a defence to a bill for a specific performance; and is totally inadmissible, at law or equity, as a ground to compel a performance in specie." See also, Botsford v. Burr, 2 Johns. Ch. Rep. 405.

(\*147)

was a new agreement, and the laying out the money was a part-performance on one part, and ought to be carried into execution; and built his decree on these cases: first, where a parol agreement was for a building lease, and before it was reduced into writing, the lessee began to build, and after differing on the terms of the lease, the lessee brought a bill, and the lessor insisted on the statute of frauds; the Lord Keeper dismissed the bill, but the plaintiff was relieved in *Dom. Proc.*: and the second was a case in Lord Jefferies's time.

Then came the case of Buckhouse and Crossby, before Lord Hardwicke(m), where, to a bill filed by a purchaser for a specific performance, the vendor insisted the contract had been discharged by parol, and the case of (\*)Goman v. Salisbury was cited by his counsel, as an authority in his favor. The Lord Chancellor, under the circumstances, decreed for the plaintiff, with costs; and declared, that though he would not say that a contract in writing would not be waved by parol, yet he should expect, in such a case, very clear proof; and the proof, in the present case, he thought very insufficient to discharge a contract in writing; and observed, that the statute of frauds and perjuries requires that "all contracts and agreements concerning land should be in writing." Now, an agreement to wave a purchase contract is as much an agreement concerning lands as the original contract. However, he said, there was no occasion now to determine this point.

And, in another case, Lord Hardwicke is reported to have said, that it was certain that an interest in land could not be parted with, or waved by naked parol, without writing; yet articles might, by parol, be so far waved, that if the party came into equity for a specific execution, such parol waver would rebut the equity which the party

(m) 2 Eq. Ca. Abr. 32, pl. 44; 10 Geo. II. vol. 1. 23 before had, and prevent the Court from executing them

specifically (n)(92).

The case of Legal v. Miller(o), comes next in point of time. The agreement was for taking a house at 32l. per annum, and part of the agreement was, that the owner should put the house in repair. It was afterwards discovered not to be worth while barely to repair the house, but better to pull it down; and, therefore, without any alteration in the written agreement, the house was pulled down by consent of the tenant, apprised of the great expense it would be to the landlord; and an agreement was made by parol only, on the part of the tenant, to add (\*)81. per annum to the 321. The tenant brought a bill for specific performance, on the foot of the written agreement, by which he was to pay only the 32l. rent. The defendant, by his answer, set up the parol agreement. Sir John Strange said, such evidence is frequently suffered to be read, especially to rebut such an equity as now insisted on by the bill: as where the agreement is in part carried into execution, parol evidence is allowed to prove that; or where it is a hard agreement; and the Court may, therefore, decree against the written agreement, as in 1 Vern. 240, (Goman v. Salisbury); and the single question being here, whether the Court should decree a specific performance of the agreement the plaintiff insists upon, and being satisfied, from the parol evidence, that it should not, the Court must dismiss the bill. And in the subsequent case of Pitcairne v. Ogbourne(p), Sir John Strange referred to this decision, and approved of it.

<sup>(</sup>n) Bell v. Howard, 9 Mod. 302; and see Earl of Anglesea v. Annesley, 4 Bro. P. C. 421.

<sup>(</sup>o) 2 Ves. 299.

<sup>(</sup>p) 2 Ves. 375.

<sup>(92)</sup> See Stevens v. Cooper, 1 Johns. Ch. Rh. Rep. 430. (\*149)

In the late case of Price v. Dyer(q), which has already been mentioned, where a parol waver of a written agreement was set up as a defence to a specific performance, Sir William Grant was of opinion, 1st, that there was not an abandonment of the agreement, but merely a variation; and 2d, that as the variation was without consideration, and had not been acted upon, it was not a good defence to the plaintiff's demand. His Honor, after premising that the original written agreement was binding, and had not, in his opinion, been waved, added, that he inclined to think the effect of a clear abandonment by parol, would be to discharge the written agreement. But in the cases cited, the parol agreement put an end to the transaction, and restored the parties to their original situation. Here there was a mere variation. The (\*)question then was as to the variation. Variations acted upon, as in Legal v. Miller, would be a bar; that is, a fraud. But his opinion was, that verbal variations were not a sufficient bar where the situation of the parties, in all other respects, remained unaltered. The defendant had lost nothing; would lose nothing. He had only lost what he had gratuitously gained. A specific performance of the original agreement was decreed, but without costs.

I have thought it of importance to bring all the cases which I have met with, on this point, fully before the reader, who will not fail to perceive, that in every case, except that in Viner, the party insisting upon the parol agreement, was not requiring the aid of the Court, but merely set up the agreement as a bar to a specific performance; and therefore, in strictness, these cases belong to the class before discussed, where the Court will admit the evidence to rebut the plaintiff's equity, although it would be inadmissible as a ground for relief. In the

<sup>(</sup>q) MS. Rolls; S. C. 17 Ves. jun. 356.

case in Viner, indeed, the person relying on the parol agreement was plaintiff; but the new agreement was in part performed by him, and the Master of the Rolls of that day expressly founded his decree on that ground. No case seems to go beyond that. In the case of Price and Dyer, the parol agreement was not, under the circumstances, held to be a sufficient defence.

Whether an absolute parol discharge of a written agreement, not followed by any other agreement upon which the parties have acted, can be set up even as a defence in equity, seems questionable. The result of the authorities as to a parol variation, appears to be,

1st, That evidence of it is totally inadmissible at law.
2dly, That in equity the most unequivocal proof of it will be expected.

3dly, That if it be proved to the satisfaction of the (\*)Court, and be such a variation as the Court will act upon, yet it can only be used as a defence to a bill demanding a specific performance, and is inadmissible as a ground to compel a specific performance, unless,

4thly, There has been such a part-performance of the new parol agreement, as would enable the Court to grant its aid in the case of an original independent agreement, and then, in the view of equity, it is tantamount to a written agreement.

In considering the point under discussion, the reader will be careful not to confound the foregoing cases with the case of Walker v. Constable (r). There the original agreement was a parol agreement; and the question was, whether, being abandoned, parol evidence could be given of it. Lord C. J. Eyre held, that the existence and the terms of the agreement must be proved before it could be proved to be abandoned, and upon that it was sufficient

<sup>(</sup>r) 2 Esp. 659; 1 Bos. & Pull. 306. See Adams v. Fairbain, 2 Stark. 277. (\*151)

to say, that being in writing(I) the instrument itself must be produced, and parol evidence of it was inadmissible.

II. The next branch of our subject, although the most trite, is not perhaps, therefore, less difficult. Lord Chancellor Bacon says(s), there are two sorts of ambiguities of words, the one is ambiguitas patens, and the other latens. Patens, he adds, is that which appears to be ambiguous upon the deed or instrument; latens is that which seems certain, and without ambiguity, for any thing that appears upon the instrument, but there is some collateral matter out of the deed that breeds the ambiguity.

(\*)A latent ambiguity may be assisted by parol evidence, because the ambiguity being raised by parol, may fairly be dissolved by the same means, according to the general rule of law(93). Therefore, if, previously to the statute, a man having two manors, both called Dale, had conveyed the manor of Dale to another, evidence might

<sup>(</sup>s) Max. p. 82; Reg. 23.

<sup>(</sup>I) That is, in contemplation of law, for it is not deemed an agreement unless reduced into writing.

<sup>(93)</sup> See Stackpole v. Arnold, 11 Mass. Rep. 27. Cole v. Wendell, 8 Johns. Rep. 90. 2d edit. Allen's Les. v. Lyons, MS. Rep. 1 Whart. Dig. 258. Powell v. Biddle, 2 Dall. 70. Jackson v. Stanley, 10 Johns. Rep. 133. See Jackson v. Hart, 12 Johns. Rep. 77. and Jackson v. Goes, 13 Johns. Rep. 518.; wherein the cases of Jackson and Stanley and Jackson and Hart are reviewed. See Goddard v. Bulow, 1 Nott & M'Cord, 45. Elsworth v. Buckmyer, 1 Nott & M'Cord, 431. Middleton v. Perry, 2 Bay, 539.

But parol evidence is not admissible to explain or contradict the plain and obvious meaning of words in a deed. O'Harra v. Hall, 4 Dall. 340. Hamilton v. Cawood, 3 Har. & M'Hen. 437. Paine v. M'Intier, 1 Mass. Rep. 69. See Leland v. Stone, 10 Mass. Rep. 459. Hunt v. Adams, 7 Mass. Rep. 519. Ross v. Norvell, 1 Wash. 14. See Dimond's Les. v. Enock, Addis. 356. Eli v. Adams, 19 Johns. Rep. 313.

have been given to prove which manor was intended to pass(t), and such evidence is still admissible: this has been repeatedly decided(u). So, on the same principle, parol evidence is always received to show what is parcel or not of the thing conveyed(x)(94). And if an agreement refer to a plan as an existing document upon which the contract is founded, parol evidence is admissible for the purpose of identifying the plan(y).

In some cases a latent ambiguity may be fatal. Parol evidence may be adduced to prove the ambiguity, when none sufficiently satisfactory can be offered to explain

<sup>(</sup>t) 2 Ro. Abr. 676, pl. 11; and see Lord Cheney's case, 5 Rep. 68; Altham's case, 8 Rep. 155 a; and Harding v. Suffolk, 1 Cha. Rep. 74.

<sup>(</sup>u) Jones v. Newman, 1 Blackst. 63; 3 Wils. 276; 2 Atk. 239, 240, 373; 1 Bro. C. C. 341.

<sup>(</sup>x) Quaintrell v. Wright, Bunb. 274; Longchamps v. Fawcett, Peake's Ca. 71; Doe v. Burt, 1 Term Rep. 701; Anon. 1 Str. 95; but where there is property to satisfy the words of the will, it cannot be shown by parol evidence that the testator meant to pass some not within the description. See Doe v. Oxenden, 3 Taunt. 147.

<sup>(</sup>y) Hodges v. Horsfall, 1 Russ. & Myl. 116.

<sup>(94)</sup> See Hatch v. Hatch, 2 Hayw. 32. White v. Eagan, 1 Bay, 247. Middleton v. Perry, 2 Bay, 539.

See Coutts v. Craig, 2 Hen. & Munf. 618. Doolittle v. Blakeley, 4 Day, 265. Snyder v. Snyder, 6 Binn. 483. In this case, it was held, that parol evidence was inadmissible to shew, that a part of the land granted, was excepted out of the grant.

Upon questions relating to the situation and boundary of lands conveyed, the decisions have been various; in some of the states, the English common law rule has been adopted, and in others not. See Loften v. Heath, 2 Hayw. 347. Mageehan v. Adams' Les. 2 Binn. 109. Baker v. Seekright, 1 Hen. & Munf. 177. Francis v. Hazlerig, 1 Marsh. Ken. Rep. 96. See Lawless v. Jones, Id. 17. Helm v. Small, Hardin, 369. Middleton v. Perry, 2 Bay, 539. White v. Eagan, 1 Bay, 247. As to conformity to the common law rule, see Jackson v. Bowen, 1 Caines' Rep. 358. Hamilton v. Cawood, 3 Har. & M'Hen. 437. Milling v. Crankfield, 1 M'Cord, 261.

it(z). And to render parol evidence admissible in these cases, a clear latent ambiguity must be first shown.—Evidence which merely raises a conjecture is insufficient(a).

But although a latent ambiguity may be aided by parol evidence, yet a patent ambiguity cannot be aided by extrinsic evidence, because that would in effect be to pass (\*)without deed, what by the law can be passed by deed only. Of this Lord Chancellor Bacon observes, infinite cases might be put; for it holdeth generally, that all ambiguity of words, by the matter within the deed, and not out of the deed, shall be helped by construction(95), or in some cases by election, but never by averment, but rather shall make the deed void for uncertainty(96).

In Mansell v. Price, personal estate was settled in trust for Price the defendant, and Catherine his wife, for their lives, and the life of the survivor of them, and then for their issue, with a power to the wife to dispose of 1,500l., part of the monies, to any persons she pleased. She exercised this power by giving the money to Sir Edward Mansell, in trust to pay 1,000l. to A., when she should attain twenty-one, or marry; but if she died before

<sup>(</sup>z) Thomas v. Thomas, 6 Term Rep. 671.

<sup>(</sup>a) See Lord Walpole v. the Earl of Cholmondeley, 7 Term Rep. 138.

<sup>(95)</sup> Patent ambiguities can be removed only by a sound construction of the words of the deed. Storer v. Freeman, 6 Mass. Rep. 435. King v. King, 7 Mass. Rep. 496. Revere v. Leonard, 1 Mass. Rep. 91. Mumford v. Hallett, 1 Johns. Rep. 433. Mann v. Exrs. of Mann, 1 Johns. Ch. Rep. 231. Jackson v. Sill, 11 Johns. Rep. 201. M'Dermot v. U. S. Ins. Co. 3 Serg. & Rawle, 607. Duncan v. Duncan, 2 Yeates, 302. Benezet v. M'Clenachan, cited in M'Mina v. Owen, 2 Dall. 173. Little v. Henderson, 2 Yeates, 295. Stith v. Barnes, 1 Car. Law Rep. 491. Hamilton v. Cawood, 3 Har. & M'Hen. 437. O'Harra v. Hall, 4 Dall. 340. Harris v. Dinkins, 4 Des. 60. Dupree v. M'Donald, 4 Des. 212.

<sup>(96)</sup> See Rothmahler's Admx. v. Myers, 4 Des. 215.

twenty-one, or marriage, then it should be to such uses as B. should appoint. And the other 500l. she directed to be paid to C., in exactly the same terms as before. The bill was filed by the guardian of A. and C., infants, to have the money paid, and to be put out for them to have the interest thereof immediately. For the defendant Price, it was insisted that he was entitled to the interest of 1,500l., until it should become payable. The first question was, whether parol evidence could be admitted to explain the intention of Catherine Price what should become of the interest till the times of payment; for if that could be admitted, there was sufficient to prove the husband should not have it. And the Master of the Rolls was of opinion that such evidence could not be read(b).

(\*) So in Kelly v. Powlet(c), the question was, whether plate passed under a bequest of household furniture. The drawer of the will said, it was *not* intended; but his evidence was refused, and the plate was held to pass(97).

Again, in a case in the  $\operatorname{Exchequer}(d)$ , it appeared that, by an act of parliament, cast plate-glass was directed to be squared into plates of certain dimensions. The question was, whether certain plates were in the shape directed by the act. The Attorney-general at the trial produced books explaining the process and terms of art in the manufacture, and the defendants offered evidence to prove the

 <sup>(</sup>b) MS. T. Term, 8 & 9 Geo. II.; and see Hart v. Durand, 8
 Anstr. 684; Chamberlaine v. Chamberlaine, 2 Freem. 52; Ulrich v. Ditchfield, MS. 2 Atk. 372, where the evidence was not received.

<sup>(</sup>c) 1 Bro. C. C. 476, cited; Ambl. 605, reported, which I conceive has overruled Pendleton v. Grant, 1 Eq. Ca. Abr. 230, pl. 2; 2 Vern. 517; and see 1 Bro. C. C. 350, 351; Seymour v. Rapier, Bunb. 28; Doe v. Bland, 11 East, 441.

<sup>(</sup>d) Attorney-general v. the Cast Plate-Glass Company, 1 Anstr. 39.

<sup>(97)</sup> See *Mann* v. Exrs. of *Mann*, 1 Johns. Ch. Rep. 231. See also, 1 Yeates, 432. 1 Gallis. 173.

<sup>(\*154)</sup> 

technical meaning in the trade of the word squaring glass; the evidence was, however, refused, and a verdict found against the defendants: and upon a motion for a new trial. Lord Chief Baron Evre said: In explaining an act of parliament, it is impossible to contend that evidence should be admitted, for that would be to make it a question of fact, in place of a question of law(98). The judge is to direct the jury as to the point of law, and in doing so must form his judgment of the meaning of the Legislature, in the same manner as if it had come before him on demurrer. when no evidence would be admitted. Yet on a demurrer a judge may well inform himself from dictionaries or books, on the particular subject concerning the meaning of any word. If he does so at nisi prius, and shows them to the jury, they are not to be considered as evidence, but only as the grounds on which the judge has formed his opinion, as if he were to cite any authorities for the point of law he lays down.

(\*)So parol evidence is inadmissible to restrain the legal operation of general words in an instrument. Therefore it cannot be admitted to prove, that a particular estate was not intended to pass under general words sufficient to comprise it(99).

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<sup>(98)</sup> In the case of M'Keen v. Delancy's I.es. 5 Cranch, 22, 32., the Supreme Court of the U.S. considered themselves bound to put the same construction upon the words of an act of assembly as had been uniformly given by the state courts; but if the construction were to be given for the first time, they would have construed the statute differently. See Sleght v. Hartshorn, 2 Johns. Rep. 531. But whenever a question arises as to the construction of words, qua words, parol evidence cannot be admitted to explain them. M'Dermot v. U.S. Ins. Co. 3 Serg. & Rawle, 609. Holmes v. Simons, 3 Des. 149. Parol evidence cannot be admitted to contradict the common meaning or legal import of plain words in a will. Shelton v. Shelton, 1 Wash. 53.

<sup>(99)</sup> See Stith v. Barnes, 1 Car. Law Rep. 491. Nor can the meaning and operation of an instrument in writing, be extended, or enlarged beyond the plain and obvious import of the words used, so as to

Thus in Davis v. Thomas(e), a husband and wife being seized of settled estates in the county of Pembroke, bought an estate in the same county, called Rigman Hill, which was conveyed to them, and the survivor in fee. The husband having prevailed on the wife to join with him in suffering a recovery of the settled estates, in order to enable him to mortgage them, gave the attorney employed to suffer the recovery a particular description of the settled estates, which did not comprise Rigman Hill; and it clearly appeared from several circumstances, that he had not any intention to comprise that estate, the titledeeds of which were in his wife's custody. The attorney, fearful of not comprising the whole estate, and not knowing that Rigman Hill had been purchased, added general words sufficient to comprise that estate. The recovery was suffered to the use of the husband in fee, who afterwards mortgaged the estate by the same description. The husband by his will gave all his estates to his wife for life. She survived him, and after her death the heir at law of the husband brought an ejectment against the persons claiming Rigman Hill, under the wife, which came on to be tried at the April Great Sessions for Pembrokeshire, in 1756. Parol evidence was offered by the defendant, to show that it was not intended to comprise Rigman Hill in the recovery and mortgage; but it was refused, and the plaintiff had a verdict.

So in Shelling v. Farmer (f), where to a release in

<sup>(</sup>e) Reg. Lib. 1757, fol. 33, 34. See Thomas v. Davis, 1 Dick, 301, et infra.

<sup>(</sup>f) 1 Str. 646. See Strode v. Lady Falkland, 2 Vern. 621; 3 Cha. Rep. 90; and Goodinge v. Goodinge, 1 Ves. 231.

include other objects not expressed in the writing itself: Thus, where receipts were given by the heirs of an estate, to the administrator, for their shares of the estate, parol evidence cannot be admitted to shew, that it was the intention of the parties to release their interest in the real estate; especially, where the money received was greatly inadequate to their shares. Harris v. Dinkins, 4 Des. 60.

(\*)pursuance of an award, the plaintiff would have called the arbitrators to prove that they refused to take into consideration a particular fact, although the award and release contained *general words* sufficient to take in all. Eyre, C. J. would not suffer any evidence to be given to contradict the deed(100).

And in the recent case of Butcher v. Butcher(g) general words in a release were held not to extend to a certain bond of indemnity: and Lord Chief Justice Mansfield, at Guildhall, refused to admit parol evidence to show the intention of the releasor to release the bond(101). And upon a motion for a new trial, the Court of Common Pleas intimated a strong opinion, that no evidence could be admissible to explain the release, since the doubt, if any, was ambiguitas patens; and in consequence of this intimation the counsel for the plaintiff declined arguing the case.

But, as we shall presently see, the effect of general words may be restrained in a court of equity, on the ground of mistake, where it is satisfactorily proved.

It still remains to observe, that courts both of law and equity constantly advert to the situation of the parties, &c. in order to enable them to construe ambiguous or ill-penned instruments, although parol evidence of the intention of the parties could not be received, and this has been sanctioned by a leading case in the House of Lords(h)(102).

<sup>(</sup>g) 1 New Rep. 113.

<sup>(</sup>h) Sir John Eden v. the Earl of Bute, 7 Bro. P. C. 745. See Countess of Shelburne v. the Earl of Inchiquin, 1 Bro. C. C. 338.

<sup>(100)</sup> See De Long v. Stanton, 9 Johns. Rep. 38. Munroe v. Alaire, 2 Caines' Rep. 320. Sessions v. Barfield, 2 Bay, 94.

<sup>(101)</sup> See Parsons v. Hooker, 3 Johns. Rep. 68.

<sup>(102)</sup> See Ambler v. Norton, 4 Hen. & Munf. 23. Kennon v. M'Roberts, 1 Wash. 102. Shermer v. Shermer's Exrs. 1 Wash. 272. Dabney v. Green, 4 Hen. & Munf. 101. Gay v. Hunt, 1 Murph. 141. (\*156)

In one case(i), where it was doubtful whether a covenant for renewal extended to a perpetual renewal, and the parties had renewed four times successively under the covenant, Lord Mansfield and the other Judges of the (\*)King's Bench held, that the parties themselves had put a construction upon the covenant, and were therefore bound by it. Lord Alvanley, who was in the cause, said, when Master of the Rolls, that he was never more amazed than at this decision, and that Mr. Justice Wilson, who argued with him, was astonished at it(j); and his Lordship more than once expressed his marked disapprobation of this doctrine(k). Lord Eldon(l), and Sir Wm. Grant(m), have both also dissented from it; and Kord C. J. Mansfield, in a late case, observed, that it was a case which had been impeached upon all occasions(n). And it appears to be now clearly settled, that in the construction of an agreement or deed, the acts of the parties cannot be taken into consideration(o)(103).

Where, however, the words of an ancient statute or instrument are doubtful, contemporaneous usage, although it

<sup>(</sup>i) Cook v. Booth, Cowp. 819; and see Blackst. 1249; 1 New Rep. 42. See Peake on Evid. ch. 2.

<sup>(</sup>j) Baynham v. Guy's Hospital, 3 Ves. 295; and see 2 Ves. jun. 448.

<sup>(</sup>k) See Eaton v. Lyon, 3 Ves. jun. 690.

<sup>(1)</sup> See Iggulden v. May, 9 Ves. jun. 325.

<sup>(</sup>m) See Moore v. Foley, 6 Ves. jun. 232.

<sup>(</sup>n) See 2 New Rep. 452.

<sup>(</sup>o) See Clifton v. Walmsley, 5 Term Rep. 564; and see Iggulden v. May, 7 East, 237.

Powell v. Biddle, 2 Dall. 72. Possession of land may be resorted to, in order to explain the intention of parties, where the words of the deed are equivocal. Livingston v. Ten Broeck, 16 Johns. Rep. 14. Per SPENCER, J.

<sup>(103)</sup> See Souverbye v. Arden, 1 Johns. Ch. Rep. 240. Revere v. Leonard, 1 Mass. Rep. 93; and see Cortelyou v. Van Brundt, 2 Johns. Rep. 357.

<sup>(×157)</sup> 

cannot overturn the clear words of the instrument, will be admitted to explain it(104); for jus et norma loquendi is governed by usage, and the meaning of things spoken or written must be as it hath constantly been received to be by common acceptation(p). This has been determined in many cases, and such evidence accordingly received(q). And in a late case on this subject, Lord Ellenborough (\*)said, it was in constant practice at nisi prius to receive evidence of usage to explain doubtful words in old instruments; and it would be difficult to show any just ground of distinction between the information which a Judge might receive to aid his judgment in bank and at nisi prius(r).

III. The last division of our subject relates to the jurisdiction of equity, in correcting mistakes and fraudulent omissions in agreements and deeds(I)(105).

(p) Sheppard v. Gosnold, Vaugh. 169.

(q) Rex v. Varlo, Cowp. 246; Gape v. Handley, 3 Term Rep. 228, n.; Blankley v. Winstanley, 3 Term Rep. 279; Rex v. Bellringer, 4 Term Rep. 810; Rex v. Miller, 6 Term Rep. 268; and see Attorneygeneral v. Parker, 2 Atk. 576; Attorney-general v. Forster, 10 Ves. jun. 335; Kitchin v. Bartch, 7 East, 53; Bailiffs, &c. of Tewkesbury v. Bricknell, 2 Taunt. 120.

(r) Rex v. Osbourne, 4 East, 327; and see Stammers v. Dixon, 7 East, 200.

(I) Even at law the palpable mistake of a word will not defeat the intention of the parties. In a case in the Common Pleas, where the condition of a bond was, that it should be void if the obligor did not pay; and performance being pleaded on the ground of literal expression,

<sup>(104)</sup> See Livingston v. Ten Broeck, 16 Johns. Rep. 14. Evidence of usage is not admissible to explain the language of a deed not ambiguous or equivocal. Cortelyou v. Van Brundt, 2 Johns. Rep. 357.

<sup>(105)</sup> It is well settled, that courts of equity will relieve against mistakes in agreements. Wiser v. Blackley, 1 Johns. Ch. Rep. 607. Gillespie v. Moon, 2 Johns. Ch. Rep. 585. Keisselbrack v. Livingston, 4 Johns. Ch. Rep. 144. Barndollar v. Tate, 1 Serg. & Rawle, 160.

In Henkle v. the Royal Exchange Assurance Office(s), Lord Hardwicke said, that no doubt but equity had jurisdiction to relieve in respect of a plain mistake in contracts in writing, as well as against frauds in contracts; so that if reduced into writing contrary to the intention of the parties, on proper proof that would be rectified; he thought, however, that in these cases there should be the strongest proof possible. In a case which was much agitated before Lord Thurlow, he laid down the rule with great latitude, that if a mistake appears, it is as much to be rectified as fraud(t). So in another case before the (\*)same Chancellor, he said that he thought it impossible to refuse, as incompetent, evidence which went to prove that the words taken down were contrary to the concurrent intention of all parties. To be sure, he added, it

(s) 1 Ves. 317.

(t) Taylor v. Radd, 5 Ves. jun. 595, cited.

the Court held the plea bad. Anon. Dougl. 384, cited, 2d edition. See 1 Dow, 147. It seems clearly settled, that words evidently omitted in a will by mistake may be supplied, both at law and in equity, Tollett v. Tollett, Ambl. 194; Coryton v. Hellier, 2 Bur. 923, cited; and Doe v. Micklem, 6 East, 486; see Lane v. Goudge, 9 Ves. jun. 225; Mellish v. Mellish, and Phillips v. Chamberlain, 4 Ves. jun. 45, 51; but however evident the mistake may be, the words will not be supplied if the testator's manifest intention would be defeated by the insertion of them. Chapman v. Brown, 3 Burr. 1626. See 2 Ves. jun. 365.

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Smith v. Williams, 1 Murph. 426. Middleton v. Perry, 2 Bay, 539. White v. Eagan, 1 Bay, 247. Geer v. Winds, 4 Des. 85. Washburn v. Merrills, 1 Day, 139. Peters v. Goodrich, 2 Conn. Rep. 146. Mead v. Johnson, 2 Conn. Rep. 592. Argenbright v. Campbell, 3 Hen. & Munf. 144. In this case, a mistake in one writing was corrected by another, to which it referred. In Christ v. Diffebach, 1 Serg. & Rawle, 465., TILGHMAN, Ch. J. said, "It may be laid down as settled law, that parol evidence is admissible in cases of fraud and of plain mistake in drawing a writing."

must be strong, irrefragable evidence, but he did not think he could reject it as incompetent (u)(106).

Lord Eldon, observing upon these dicta, said, that Lord Thurlow seemed to say that the proof must satisfy the Court what was the concurrent intention of all parties; and his Lordship added, it must never be forgot to what extent the defendant, one of the parties, admits or denies the agreement (107). In the case before Lord Eldon(x), a specific performance of an agreement was sought, with a variation attempted to be introduced by parol, on the ground of mistake and surprise, which was positively denied by the defendant. And his Lordship said, that he would not say, that upon the evidence without the answer, he should not have had so much doubt whether he ought not to rectify the agreement, as to take more time to consider whether the bill should be dismissed; but as the agreement was to be considered with reference to the answer by which he had positively denied it, his Lordship dismissed the bill, but without costs(108).

<sup>(</sup>u) Countess of Shelburne v. the Earl of Inchiquin, 1 Bro. C. C. 338; and see Cock v. Richards, 10 Ves. jun. 441.

<sup>(</sup>x) Marquis of Townshend v. Stangroom, 6 Ves. jun. 328.

<sup>(106)</sup> See Gillespie v. Moon, ut supra. Lyman v. United Ins. Co. 2 Johns. Ch. Rep. 630. Souverbye v. Arden, 1 Johns. Ch. Rep. 240, 252. Getman's Exrs. v. Beardsley, 2 Johns. Ch. Rep. 274. Dupree v. M'Donald, 4 Des. 210, 211.

<sup>(107)</sup> In Gillespie and Moon, ut supra, it was held, that parol evidence was admissible to shew a mistake, although it be denied in the answer; and such evidence is to be received, as well, where the plaintiff seeks relief on the ground of the mistake, as where the defendant sets it up as a defence. As to the efficiency of an answer denying an allegation in the bill, and the evidence necessary to outweigh the answer, see Zilstra v. Keith, 2 Des. 140. See also, Lyman v. United Ins. Co. ut supra, and Gillespie v. Moon, 2 Johns. Ch. Rep. 593. Pringle v. Samuel, 1 Litt. 43.

<sup>(108)</sup> See Lyman v. United Ins. Co. 2 Johns. Ch. Rep. 630. In Gillespie v Moon, 2 J. Ch. R. 585, where the bill was brought

Lord Eldon's decision precisely accords with Lord Thurlow's opinion, which he rightly construed. For in

to rectify a mistake, in the conveyance to the defendant, which, by an error in the description of the land, conveyed the whole lot, or 250 acres, instead of 200 acres parcel of the same. The mistake was denied in the answer; and it was objected that parol evidence of the mistake was not admissible, in order to explain the language of the deed, and, especially in opposition to the answer of the defendant. The Chancellor, however, admitted the evidence. "The cases, he remarked, concur in the strictness and difficulty of the proof, but still they all admit it to be competent, and the only question is, does it satisfy the minds of the Court? Lord Hardwicke said, it must be proper proof, and the strongest proof possible; and Lord Thurlow, that it must be strong, irrefragable proof; and, he said, the difficulty of the proof was so great, that there was no instance of its prevailing against a party insisting that there is no mistake. We are now considering the question of the competency, and not of the amount of the parol proof, and it appears to be the steady language of the English Chancery, for the last 70 years, and of all the compilers of the doctrines of that court, that a party may be admitted to show, a mistake, as well as fraud, in the execution of a deed or other writing.

Application of the principle. On bills for a specific performance of an agreement in writing, the defendant has frequently been admitted to show, by parol proof, a mistake in such agreement, and, by that means, to destroy the equity of the bill. The relief on such bills is said to rest in discretion, and if the defendant can show surprise or mistake, it makes the special performance of such an agreement unjust. There is another class of cases in which the object of the parol proof is to correct mistakes in bonds, deeds of settlements, mortgages, and, generally, in all contracts and agreements, and where the proof is introduced to aid the plaintiff in his bill, as well as to aid the defendant in his defence.

Whether such proof be admissible on the part of a plaintiff who seeks specific performance of an agreement in writing, and at the same time seeks to vary it by parol proof, has been made a question. Lord Hardwicke in Jones v. Statham, 3 Atk. 388, seemed to think it might be done; but such proof was rejected by the master of the Rolls in Wollam v. Hearn, 7 Ves. 211. and again in Higginson v. Clowes, 15 Ib. 516; and Lord Redesdale said, in Clinan v. Cooke, 1 Scho. & Lef. 39, that he could find no decision in which a plaintiff had been permitted to show an omission in a written agreement, by mistake-or fraud, he must be understood to refer to cases of bills for a specific performance of an agreement, which was the case then before him. There are numerous

Lord Irnham v. Child(y), it was observed by Lord Thurlow, that if a mistake be admitted, the Court would not

(y) 1 Bro. C. C. 92; and see Hare v. Shearwood, 3 Bro. C. C. 168;1 Ves. jun. 241; and Haynes v. Hare, 1 Hen. Blackst. 659.

instances in which the plaintiff has claimed and obtained relief, by showing a mistake in the agreement; and there would be a most deplorable failure of justice, if the mistakes could only be shown and corrected when set up by a defendant to rebut an equity. The cases of Randal v. Randal, 2 P.Wms. 464; Rogers v. Earl, Dickens, 294, and of Barstow v. Kilvington, 5 Ves. 593, were bills filed to rectify mistakes in settlements; and in all of them proof aliunde was admitted, though the admission was resisted; and, in two of the cases by the defendant, who claimed as heir against the mistake.

It has been said, that there was no instance of a mistake, corrected in favor of a plaintiff, against the answer of the defendant, denying the fact of mistake. But I do not understand any of the dicta on this point to mean, that the answer, denying the mistake, shuts out the parol proof, and renders relief unattainable, however strong that proof may be. The observations of Lord Eldon in The Marquis of Townsend v. Stangroom, certainly imply no more, than that the answer is entitled to weight, in opposition to the parol proof; but it certainly can be overcome by such proof. In that very case, the answer denied the mistake, vet parol proof was held admissible. Lord Thurlow said, that there was so much difficulty in establishing the mistake, to the entire satisfaction of the court, that it had never prevailed against the answer denying the mistake. But, as I read the case of Pitcairn v. Ogbourne, 2 Ves. 375, before Sir John Strange, the bill was to be relieved against an annuity bond, and to reduce the sum according to the original understanding and agreement of the parties. Parol proof was admitted; and relief was not granted upon other and distinct grounds, no way connected with the question, as to the competency and effect of the proof.

It is the settled law of this court, as was shown in the case of Boyd v. M'Lean, 1 J. Ch. R. 582, that a resulting trust may be established by parol proof, in opposition to the deed, and in opposition to the answer denying the trust. There is no reason why the answer should have greater effect in this than in that case, and there would be manifest inconsistency in the doctrines of the court, if such a distinction existed. The case of Marks v. Pell, 1 ib. 598, 9, admitted, that parol proof of mistakes was competent; and it was held not to be sufficient, in that case, because it consisted of naked confessions of a party, made seventeen years after peaceable possession, under a deed. The confessions

overturn the rule of equity by varying the deed; but it would be an equity dehors the deed. Then it should be

also, in that case, were of a negative kind, and deduced from tacit acquiescence; the party who made them was dead, and the possession had been, for 30 years, under the deed, and there were no corroborating circumstances in aid of the confessions.

Washburn v. Merrills, 1 Day's Cas. in Error, 139, is a strong case on the subject. A mortgagor by mistake, made an absolute deed; and the mortgagee got into possession, sold to a purchaser, by a deed with covenants of warranty. A purchaser under the mortgagor filed his bill, against the purchaser, under the mortgagee to redeem. The answer set up the statute of frauds as a defence; and on the trial, parol proof of the mistake was offered by the plaintiff and admitted, and the deed established, and a right of redemption decreed. This decree was unanimously confirmed in the Court of Errors.

In the case of Comstock v. Hadlyme, S Conn. 854, where the question arose whether the declarations of the devisor, made about the time of executing her will, tending to shew that she was unduly influenced, were admissible in evidence on a trial of the probate of the will: held, that they were only admissible for the purpose of showing the state of mind of the devisor. Williams, J. "If it was claimed, that those declarations were part of the res gesta, the time when made should have been precisely stated; about the time is quite too indefinite: and if her declarations were not a part of the res gesta, I know not upon what principle they can be introduced as evidence of facts. Is a will or deed, valid upon the face of it, to be destroyed, or in any way affected, by the declarations of the devisor or grantor? Some strong authority is necessary to support such a proposition. In the case of a deed, it would not be claimed. A will, to be sure, is ambulatory; and nothing vests, during the life of the devisor. Still, however, it can be altered or revoked only in a legal manner. In Nelson v. Oldfield, 2 Vern. 76. evidence of what the testator said, to prove duress, was admitted; but no objection appears to have been made, and the Court said, the legatee had her probate, and might make what use she could of it, but a Court of Chancery would not aid her. In Jackson v. Kniffen, 2 Johns. R. 31. the Ch. says: "To permit wills to be defeated by the parol declarations of the testator, appears to me repugnant to the very genius and spirit of the statute, and not to be allowed." And in Smith v. Fenner. 1 Gall. 172. it was held, that the declarations before and at the execution of the will, were admissible, but none made after, unless so near the time of the execution as to be a part of the res gesta, or necessarily connected with it. And in Stevens v. Vancleve, 4 Wash. C. C. R. proved as much to the satisfaction of the Court, as if it were (\*)admitted: "The difficulty of this is so great,

265. Washington, J. says, "The declarations of a party to a deed or will, whether previous or subsequent to its execution, are nothing more than hearsay evidence; and nothing could be more dangerous than the admission of it, to control the construction of the instrument, or to support or destroy its validity."

In Comstock v. Haldyme, the question was presented whether a mistake in drafting a will, will render it void. The mistake consisted in omitting to insert in the will according to the direction of the testatrix a legacy to her grandchildren. The court held that the evidence was not admissible. Williams, J. observed "The statute, when it required all wills to be in writing, signed by the testator and attested by witnesses, certainly intended, that the evidence, and the whole evidence, of the disposition of property by will, should be the will itself; that the evidence of the intent of the devisor should be derived from the writing, signed by him and solemnly attested; otherwise, innumerable would be the cases, where evidence of mistake would be claimed and proved.

It has always been decided, that parol testimony could not be admitted to prove, that the devisor intended to give a different estate from what the will expressed. Chappel v. Avery, 6 Conn. 34; Farrer v. Ayres, 5 Pick. 407. It is a sacred rule of property not to be departed from. Goodtitle v. Edmonds, 7 Term 635, 640. Richards v. Dutch, 8 Mass. 506, 515. And if it is settled, that you cannot, by parol proof, alter the legal import of the terms used by the scrivener, such a will must either be void, or convey a different estate from the one intended. It is not void. Doug. 763; 1 B. & B. 261. n. Cowp. 660.

In contracts, mistakes have, indeed, been rectified, in a court of Chancery, but no case is recollected, where they have been holden void, on account of a mistake. In Phillips v. Chamberlaine, 4 Ves. jun. 51, 57. where an intention was expressed to give a legacy to the Humane Society, but no sum was inserted, the will was held not to be void. And it would seem, that in this case, if any remedy existed, it would be one that would not destroy the whole will, but one which would correct the mistake, and make it what it ought to be. That has been attempted, in a recent case; and it was decided, that parol testimony could not be admitted to prove the mistake. It would be to make a will by witnesses, and not by writing; to make a will any thing. Avery v. Chappel, 6 Conn. 270, 275. And if such evidence cannot be admitted, in Chancery, to prove a mistake in a will, where is the principle, or where the authority, that such evidence can be admitted to render the will void? Courts of law and chancery proceed upon the same principle as to ad-

that there is no instance of its prevailing against a party insisting there was no mistake."

mitting parol testimony; and it is certainly a novel idea, that courts of chancery are less liberal, on that subject, than courts of law. I think, then, it follows, that if courts of chancery cannot admit such evidence to prove a mistake, which they might correct, courts of law cannot admit it to prove a mistake to set aside the will. The danger arising from the admission of the proof is the same in both cases; and if the rules of law would allow that proof, it would be congenial to principle, and more likely to effectuate the intent of the devisor, to correct the mistake, than to make void the whole instrument. And if the former cannot be done, much less can the latter. And the fact that no case is found since the statute 29 Car. 11. is strong, if not conclusive evidence, that such has been the construction.

In Reading v. Weston, 8 Conn. 117, it was decided that parol evidence was not admissible to prove an absolute deed to be a deed on condition. Flint v. Sheldon, 13 Mass. 443. decided, that an absolute deed of land cannot be varied, by parol evidence, shewing that it was for the loan and repayment of a sum of money. But it has often been decided in Chancery, that parol evidence is admissible to shew, that an absolute deed was intended as a mortgage, and that a defeasance was omitted through fraud or mistake. Hence, a deed absolute on the face of it, and though registered as a deed, will in Chancery be held valid and effectual as a mortgage, as between the parties, if it was intended by them to be merely a security for a debt, although the defeasance was by an agreement resting in parol. Washburn v. Merrills, 1 Day 139; Strong and al v. Stewart, 4 J. Ch. R. 417; Marks & al v. Pell, 1 ib. 594; Clark v. Henry, 2 Cowen, 323; Slee v. Manhattan Co. 60, 1 Paige 48. Chancery interposes, because a court of law does not afford a remedy. The rule in the courts of law, is, that the written instrument, contains the true agreement of the parties, and that the writing furnishes better evidence of their intention than any that can be supplied by parol. But in equity, relief may be had against any deed or contract founded in mistake or fraud. See cases supra.

Though it is the province of a Court of Chancery to relieve against fraud, accident and mistake, it must be a mistake in fact and not a mistake in law. Thus, in Wheaton v. Wheaton, 9 Conn. 96. which was a bill in chancery, which alleged that the writings were drawn without the scrivener's being informed what the agreement between the parties was. Nor did the plaintiff pretend, "that the note was executed by him under mistake in any one matter of fact. It is simply, that the plaintiff ignorantly supposed a note, payable, by the terms of it, in

Where the Court cannot satisfy itself of the fact, an issue may be directed to try the question. Thus, in the case of the South Sea Company v. D'Oliff(z), D'Oliff agreed not to carry goods under certain circumstances; and if information was given in two months after return home that he had done so, he was to pay certain stated damages. The instrument was not drawn up until on board the ship, and in a great hurry, and executed there by D'Oliff; who when he got out to sea, and read it over, found it was six months instead of two; and brought a bill to be relieved against that variation in the instrument, the company having brought an action on it. Lord King sent it to an issue; it was tried on a question, whether it was the original agreement it should be two instead of six months. A verdict was given in favor of the plaintiff, that the agreement was designed to be in two, and in consequence of that, Lord Talbot made a decree to relieve the plaintiff against any difficulty by the variation.

(z) 2 Ves. 377; 5 Ves. jun. 601, cited; and see Pember v. Mathers, 1 Bro. C. C. 52.

three years, to be, in law, a note payable at the death of the obligee; and then not actually to be paid, but to be delivered up: And to show this mistake, said Bissel, J. we are asked to let in parol evidence. The court held clearly, that the evidence was not admissible. After citing Hunt v. Rousmanier, 8 Wheat. 174, and 1 Pet. U. S. R. 1, the learned Justice remarked, "It would not, perhaps, be going too far to say, that the doctrines laid down by Chief J. Marshall, in this case, were greatly shaken, by the subsequent opinion of Judge Washington; and that taking the whole case together, it will hardly warrant a departure from principles long considered as settled."

The parol declarations of the testator as to the estate he intended to give by the will are not admissible; for they cannot control what the law considers settled upon the face of the will. Farrar v. Ayres, 5 Pick. 404. However, when there is an ambiguity in the words used, which will justify an explanation by extrinsic matter, the Court will permit a resort to memoranda written and signed by the testator, to show what was intended to be included by the words in the will. Wadsworth v. Ruggles, 6 Pick. 63.

The hesitation with which parol evidence is received in equity to correct even mistakes in agreements and deeds, is strongly exemplified by a case before Sir William Fortescue(a)(109). Previously to marriage an estate was agreed to be settled on the intended husband for life, remainder to the wife for life, remainder to the sons successively in tail male, remainder to all the daughters. Instructions were given to an attorney to draw the settlement, who drew it as far as the limitations to the sons, where he (\*)stopped, and said, then go on as in Pippin v. Ekins; which was a precedent he delivered to his clerk, to go on from that limitation, and was a right settlement to the issue male and daughters by that wife; but the clerk drew the settlement to all the daughters of the husband, without restraining it to that marriage: it was executed with this mistake: the question arose between an only daughter of that marriage and children of the husband's by the second wife. The draft of the attorney was proved, and the settlement in Pippin v. Ekins; but the Court would not admit parol evidence of the attorney to be read, and held that the other evidence would not do; that nothing appearing in writing under the hands of the parties, the settlement could not be altered. And Sir Thomas Clark is reported to have said(b), that as to the head of the mistake, he did not give a positive opinion, but he did not think the Court had relied upon parol evidence singly.

But whatever difficulty there may be of admitting parol evidence singly, yet it is always admitted where it is corroborated by other evidence.

This doctrine was carried a great way in the case of Dr. Coldcot v. Serjeant Hide(c). Dr. Coldcot having

<sup>(</sup>a) Harwood v. Wallis, 2 Ves. 195, cited.

<sup>(</sup>b) 1 Dick. 295.

<sup>(</sup>c) 1 Cha. Ca. 15; 2 Freem. 173; 1 Sid. 238, cited; 14 Car. II.

<sup>(109)</sup> See Dupree v. M'Donald, 4 Des. 211.

purchased church-lands in fee, under the title of Cromwell, sold them to the defendant's testator, and entered into general covenants for the title. Upon the Restoration the estate was avoided, and upon an action on the covenants, damages to the value of the purchase-money were recovered. A bill was then filed to be relieved against the recovery at law, which suggested a surprise upon the plaintiff, in getting him to enter into general covenants, and that it was declared by the parties, when the deed was executed, that it was intended Dr. Coldcot should not undertake any further than against himself; and there (\*)being some proof of this declaration, it was decreed by the Lord Chancellor and Master of the Rolls, that the defendant should acknowledge satisfaction on the judgment, and pay costs. And the reporter says, a like case to this between Farrer v. Farrer was heard and decreed after the same manner, about six months ago.

A case, nearly similar, occurred about eleven years afterwards(d); but it appeared that all the covenants except the one upon which judgment had been obtained at law, were restrained to the acts of the vendor, and that the vendor sold only such estate as he had.

This last case was quoted in a case in the Common Pleas before Lord  $\operatorname{Eldon}(e)$ , who thought the decision must have been made on the ground of the intent of the parties appearing on the instrument, since that intent, and the consequent legal effect of the instrument, could only be collected from the instrument itself, and not from any thing dehors. In a still later case in the same  $\operatorname{Court}(f)$ , Lord Alvanley thought, under the circumstances of the case, that the application was made to the Court of Chancery to correct the mistake, in the same manner as applica-

<sup>(</sup>d) Fielder v. Studley, Finch, 90.

<sup>(</sup>e) Browning v. Wright, 2 Bos. & Pull. 26.

<sup>(</sup>f) Hesse v. Stevenson, 3 Bos. & Pull. 575.

tions are made to that Court to correct marriage articles where clauses are inserted contrary to the intent of the parties. It seems clear, however, that the relief in this case was founded on parol evidence that the vendor sold only such estate as he had, corroborated as it was by the form of the deed and the subject of the contract. Such evidence was received in the prior case of Dr. Coldcot and Serjeant Hide, and is still clearly admissible.

Thus in Young v. Young(g), the plaintiff married Lucy, a defendant, and an infant; the husband stated, or (\*)drew by way of instructions to his attorney, what the wife's fortune then was, and agreed to add as much to be settled in strict settlement, and likewise stated that the intended wife had a prospect of an additional fortune; to which he agreed, provided it did not exceed 1,000l., to add a like sum, to be likewise settled strictly, and he to have the excess. The settlement was prepared according to the instructions; but the solicitor having, in the margin of the draft, added double the sum, the settlement was prepared and executed according to that mistake. Parol evidence was admitted to prove the mistake; that is, the settlement was first shown to differ from the written instructions, and parol evidence of the counsel and attorney was then received, to prove the mistake.

This equity was administered in the case of Thomas v. Davis, before  $\operatorname{cited}(h)$ , where it clearly appeared, that the estate in question was not intended to be comprehended in the general words. This appeared from many circumstances, but particularly from the description of the estate given by the husband to the attorney by way of instructions, which described the lands particularly, and did not include Rigman Hill; and the attorney proved that he did not know of this estate, and that he introduced gener-

<sup>(</sup>g) 1 Dick. 295, cited. See 1 Dick. 303, 304.

<sup>(</sup>h) Supra, p. 155; 1 Dick. 301; Reg. Lib. B. 1757, fol. 33, 34. (\*163)

al words, merely to guard against any wrong or imperfect description of the lands actually intended to pass. It was objected, that the admission of the attorney's evidence was in direct contradiction to the statute of frauds; but Sir Thomas Clark was clear it might be read, and accordingly admitted it(I).

(\*) So in Rogers v. Earl(i), instructions were given, previously to marriage, for a settlement of the wife's estate on the husband during his life, if he and his wife should so long live, remainder to the wife for life, remainder to the issue of the marriage in strict settlement, remain der to such uses as the wife should appoint; and a draft of a settlement was drawn accordingly. And after the limitation to the husband, it stood thus: And immediately after the decease of the husband, then to the wife, &c.; and proper limitations were inserted to trustees to preserve contingent remainders. When the wife saw the draft, thinking she was past child-bearing, she objected to the limitations to the issue, and they were directed to be struck out. The attorney, by mistake, not only struck out those limitations, but also the limitation to the wife for life, and the subsequent limitation to trustees to pre-

(i) 1 Dick. 294. Note, the facts are not stated in the report; they are extracted from the Registrar's book; see Reg. Lib. B. 1756, fol. 205; see Pritchard v. Quinchant, Ambl. 147; 5 Ves. jun. 596, n. (a); and Barstow v. Kilvington, 5 Ves. jun. 593; and see Nelson v. Nelson, Nels. Cha. Rep. 7; Shaw v. Jakeman, 4 East, 201.

<sup>(1)</sup> The judgment is very inaccurately stated in the report. After addressing himself to the general words, the Master of the Rolls is stated to have said, Do these words comprise Redmond [Rigman] Hill? I do not think they do include Redmond Hill; but other words do. If Redmond Hill was not intended, why was the wife to join; and why did she join?—This is absolute nonsense. The wife joined because she was interested in the settled estates; and the opinion of the Court was, that the general words did include Rigman Hill. The editor's marginal abstract of this case shows how difficult it is to understand the report of it.

serve, and the deed was executed without the mistake being discovered, whereby, as the bill stated, the said power for appointing the reversion of the premises was made to take place on the decease of the plaintiff generally, though the limitation to him was only during the joint lives. The wife exercised her power by deed in favor of her husband during his life, and then by will gave him the fee, and then died in his life-time. Her heir-at-law insisted that the use resulted to him during the husband's life, and that there being no trustee to preserve (\*)contingent remainders, the devise in the will as an execution of the power, not taking effect till the determination of the particular estate, was void, and brought an ejectment against the husband, and obtained a verdict(I). The husband then filed a bill for an injunction, and to rectify the mistake in the settlement. The defendant, by his answer, urged that the draft of the settlement might have been altered with a view to support the husband's claim, and insisted that parol evidence could not be received; but Sir Thomas Clark decreed, that the power appeared to have been designed so far to extend as to enable her to dispose of the interests in the estates after the determination of the coverture, and during the life of her husband, as well as to dispose of the inheritance of the estates after her husband's decease, and ordered the settlement to be rectified accordingly; but without costs on either side.

In the last case upon the subject(k), a conveyance of a portion of church-tithes upon a purchase was made, contrary to what was considered to be the true construc-

<sup>(</sup>k) Rob v. Butterwick, 2 Price, 190; and see Beaumont v. Bramley, 1 Turn. 41.

<sup>(</sup>I) The first point at least was clear at law, but the defendant set up an old term as a bar to the plaintiff's right to recover. The defence, however, did not succeed. See Farmer dem. Earl v. Rogers, 2 Wils. 26. (\*165)

tion of the written agreement, subject to a proportion of the rent reserved by the lease of the tithes; and upon proof that this was done by the mistake of the *purchaser's* attorney, and that the rent had not been demanded for several years, the deed was after the lapse of several years rectified and made conformable to the written agreement(110).

If a settlement be made contrary to the intention of the (\*)parties, merely to prevent a forfeiture(I), parol evidence

(I) In this case the settlement was to prevent the estate from being sequestered on account of the husband having been in arms for Charles the first. The decree was made in the reign of James his son. So

(110) See Table v. Archer, 3 Hen. & Munf. 399; as to marriage articles; and where the English decisions are reviewed.

Under circumstances which denote fraud in omitting to reduce a part of an agreement into writing, the whole is open to parol proof. And, upon the basis of part performance, where possession has been taken or the acts done amount to part performance, the court may receive parol proof of the whole agreement, independent of or in connection with what may be in writing, in order to make out the contract. principle was recognised in the late case of Physe v. Wardell, 2 Edwards' C. R. 47, where Phyfe held under a church lease; and Wardell & al. contracted for the purchase thereof subject to a lease for a year of a part of the premises; but the writing omitted to specify all the particulars of the contract; but the defendants said it was well understood. After obtaining a renewal of the church lease, the defendants refused to execute the contract. The court overruled the demurrer put in by the defendants. "An objection is taken because part of the agreement is not in writing. The bill sets forth the reason of the omission: it was induced by the representations of the defendants, and the complainant confided in them. If they were now permitted to take advantage of the omission and hold the complainant strictly to the written memorandum as the only evidence of the agreement, this Court would be sanctioning the commission of a fraud. For the purpose of preventing such a consequence, this court, under the circumstances, is at liberty to disregard the writing and treat the transaction as a verbal contract. This principle appears to have been acknowledged by Ch. J. Thompson, before the Court of Errors, in Parkhurst v. Van Cortland, 14 Johns. R. 33.

is admissible of the real intent of the parties (l), and the settlement will be rectified in conformity with it.

Where parties omit any provision in a deed, on the impression of its being illegal, and trust to each other's honor, they must rely upon that, and cannot require the defect to be supplied by parol evidence.

Thus in Lord Irnham v. Child(m), it appeared that Lord Irnham treated with Child for sale of an annuity. Upon settling the terms, it was agreed that the annuity should be redeemable; but both parties supposing that this appearing upon the face of the transaction would make it usurious, it was agreed that the grant should not have in it a clause of redemption; and it was accordingly drawn and executed without such a clause. Lord Thurlow refused to supply the omission. A similar decision was made by Mr. Justice Buller, when sitting in Chancery for the Lord Chancellor(n); and two similar determinations were made by Lord Kenyon, when Master of the Rolls(o).

- (\*)Upon these cases Lord Eldon observes, that they went upon an indisputably clear principle, that the parties did not mean to insert in the agreement a provision for re-
- (1) Harvey v. Harvey, 2 Cha. Ca. 180, decided the same way, first by Sir Harbottle Grimston, then by Lord Nottingham, and afterwards by Lord Chancellor Jefferies; and see Fitzgib. 213, 214; see Stratford v. Powell, 1 Ball & Beatty, 1.
  - (m) 1 Bro. C. C. 92.
- (n) Hare v. Shearwood, 1 Ves. jun. 241; 3 Bro. C. C. 168. See and consider Haynes v. Hare, 1 Hen. Blackst. 659(II).
- (o) Lord Portmore v. Morris, 2 Bro. C. C. 219; 1 Hen. Blackst.663, 664; Rosamond v. Lord Melsington, 3 Ves. jun. 40, n.

that as to the nature of the forfeiture, it is evident that the relief of equity would not have been afforded, for the purpose of upholding the settlement, except under the Restoration!

(II) Perhaps this case does not belong to this line of cases, but should be classed with those in which a term is omitted by mistake; of which vide supra.

<sup>(\*167)</sup> 

demption, because they were all of one mind that it would be usurious; and they desired the Court to do not what they intended, for the insertion of that provision was directly contrary to their intention; but they desired to be put in the same situation as if they had been better informed, and consequently had a contrary intention. The answer is, they admit it was not to be in the deed; and why was the Court to insert it, where two risks had occurred to the parties; the danger of usury, and the danger of trusting to the honor of the party?

But fraud is in equity an exception to every rule. In the case of Lord Irnham v. Child, Lord Thurlow distinctly said, if the agreement had been varied by fraud, the evidence would be admissible. If the bill stated that the clause was intended to be inserted, but it was suppressed by fraud, he could not refuse to hear evidence read to establish the rule of equity. Lord Kenyon advanced the same doctrine in the cases before him, and Mr. Justice Buller also thought that parol evidence was, in such cases, admissible (p).

The only difficulty in these cases is, to ascertain what shall be deemed fraud. If parties merely agree to a term, and then execute an instrument in which the term is omitted, without objecting to the omission of it, the Court cannot relieve the injured party(q). So where a lessor drew a lease for one year, instead of twenty-one, and then read it for twenty-one years, the lessee brought his bill to be relieved; but as he could read, it was deemed his own (\*)folly; and as the case was within the statute, his bill was dismissed with costs(r). Again, where in a lease the

<sup>(</sup>p) And see Taylor v. Radd, 5 Ves. jun. 395, cited; Henkle v. R.
E. A. Office, 1 Ves. 317; and see Pitcairne v. Ogbourne, 2 Ves. 375;
Countess of Shelburne v. the Earl of Inchiquin, 1 Bro. C. C. 338.

<sup>(</sup>q) See Rich v. Jackson, 4 Bro. C. C. 514; et supra, p. 143.

<sup>(</sup>r) Anon. Skin. 159.

right to enter, cut, and carry away the trees, was reserved to the lessor, the lessee went into parol evidence to show that that was contrary to the original agreement, and proved a conversation previously to the execution of the lease, in which the landlord assured the lessee he should not cut the timber, and only reserved it in order that all his leases might be uniform. The plaintiff's counsel, however, gave up this part of the bill at the hearing(s), and Lord Rosslyn treated it as clearly wrong. So I am told that in a very recent case at law(t), where a warrant of attorney was given to confess judgment on the assurance of the creditor that no execution should issue for three years, and execution was, contrary to this parol agreement, issued immediately, the Court inclined, that as the defendant knew the contents, and had sufficient time to read the warrant of attorney, they could not relieve; and yet a court of law considers itself to have a considerable controlling power over its own judgments entered up under warrants of attorney, where the party entering them up has been guilty of a fraud(u). The case, however, went off on another ground(111).

In the Countess of Shelburne v, the Earl of Inchiquin(x), Lord Thurlow said, if two persons entrust a third person to draw up minutes of their intention, and such

- (s) Jackson v. Cator, 5 Ves. jun. 688.
- (t) Gennor v. Macmahon, M. T. 1806, B. R.
- (u) See 1 H. Blackst. 63, 664.
- (x) 1 Bro. C. C. 350; and see Crosby v. Middleton, 3 Cha. Rep. 99; Langley v. Brown, 2 Atk. 195; Baker v. Paine, 1 Ves. 6.

<sup>(111)</sup> As to the validity of private agreements of parties, relating to the proceedings in a cause. See *Dunlop's* Les. v. Speer, 3 Binn. 169. Plankenhorn v. Cave, 2 Yeates, 370. Parol evidence is inadmissible to shew, that a levy and sale under a fi. fa. has been abandoned by the plaintiff, in contradiction of the sheriff's deed. The proper remedy, in such case, would be an application to the Court to set aside the sale. Jackson v. Vanderhayden, 17 Johns. Rep. 167.

person does not draw them according to such intention, that case might be relieved, because that would be a kind of fraud.

And it is said, that in the case of Jones v. Sheriffe(y), (\*)there were heads of an intended lease taken by an attorney in writing; but upon proof that some other clauses were agreed on between the parties at the same time, the Court decreed that those clauses should be put into the lease, notwithstanding the counsel on the other side strenuously insisted on the statute of frauds.

And if either party object to a conveyance, on the ground of a term of the agreement being omitted, and the other party promise to rectify it, whereupon the deed is executed, a specific performance of the promise will be enforced.

Thus in Pember v. Mathers, (z) a bill was filed for a specific performance of a parol agreement by a purchaser of a lease under written conditions, to indemnify the vendor against the rent and covenants; and it was objected, on the part of the defendant, that the evidence was inadmissible, upon the ground, that where the parties have entered into a written agreement, no parol evidence can be admitted to increase or diminish such agreement. The rule, Lord Thurlow said, was right; but where the objection was originally made, and promised by the other party to be rectified, it comes amongst the string of cases where it is considered as a fraud. Then the evidence is admissible. There being some doubt as to the fact, Lord Thurlow ordered it to go to law upon an issue, whether there was such a promise on the day of the execution of the agreement. Upon the trial, the jury found there was such a promise; and the plaintiff had a decree for a specific performance(112).

<sup>(</sup>y) 9 Mod. 88, cited.

<sup>(</sup>z) 1 Bro. C. C. 52; see 14 Ves. jun. 524.

<sup>(112)</sup> See Christ v. Diffeback, 1 Serg. & Rawle, 464.

So we have before seen, that where it is stipulated that the agreement shall be reduced into writing, and either party fraudulently prevents the agreement from being (\*)put into writing, equity will perhaps relieve the injured party(a).

And it is perfectly clear that where fraud is distinctly proved, or the jury infer it from the circumstances, an agreement is invalid at law, as well as in equity(b); but the reducing the agreement to writing is, in most cases, an argument against fraud.

But it must be remarked, that a deed will not be rectified in equity on the ground of mistake or fraud, to the prejudice of a *bona fide* purchaser, without notice.

Thus in the case of Thomas v. Davis(c), although the lands passed at law, yet as the mistake was clearly proved, the words were restrained as between the persons claiming under the wife, whose estate was comprised by mistake, and the heir of the husband, to whom the estate had passed by the error; but the same equity was not administered against the mortgagee, who was left in possession of the legal right which the generality of the conveyance had invested him with (113).

(a) Vide supra, p. 114.

(b) Haigh v. De la Cour, 3 Campb. 319; Emanuel v. Dane, 3 Campb. 299; Solomon v. Turner, 1 Stark. 51.

(c) Supra, p. 155; Reg. Lib. B. 1757, fol. 33, 34; 1 Dick. 301.

In Pennsylvania, where equity is a part of the law, fraud is a defence in all cases. Therefore in Stubbs v. King, 14 S. & R. 206, where the action was brought to recover the purchase money stipulated for in a (\*170)

<sup>(113)</sup> The rights of creditors, particularly, will be protected. M'Teer v. Sheppard, 1 Bay, 461. Fitzpatrick v. Smith, 1 Des. 340. See Strong v. Glasgow, 1 Car. Law Rep. 279. Hawkins v. Hawkins, Id. 496. Ross v. Norvell, 1 Wash. 14. Although parol evidence cannot be received to contradict an instrument in writing, as between parties and privies; yet, the rule does not apply to strangers, who have an interest in knowing the truth. Overseers of Berlin v. Overseers of Norwich, 10 Johns. Rep. 229.

bond, held, that the defendant, under the plea of payment with leave to give special matter in evidence agreeably to the act in that state, might show by parol evidence a misrepresentation on the part of the vendor as to the boundaries of the land; and the execution of such bond was no extinguishment of the fraud. Gibson, J. in delivering the judgment of the Court. "At the trial, the defendant was permitted to prove that while he was treating for the purchase, the plaintiff showed as the boundary, lines which are since found not to be so in fact, and that the lines designated in the conveyance, exclude land which was shown to him as part of the tract. In England such a plea would not be tolerated in a court of law, notwithstanding in Mr. Chitty's Treatise on Pleading, (vol. 2, p. 495), there is a precedent for it; but the better opinion is, that only that sort of fraud which is committed in the execution of the instrument, can be pleaded at law. Here, where equity is a part of the law. fraud is a defence in all cases. But in the conveyance to the defendant, the land is described by metes and bounds; and it is argued that the evidence contradicted the deed, by showing that the land was sold by other boundaries; and it is also contended that the declarations of the grantor having been made before the execution of the deed, were inadmissible, all former stipulations being merged in the act, which is the consummation of the contract. It is generally true, that the execution of a conveyance is the fulfilment of all previous bona fide stipulations, because such stipulations are liable to be varied whilst negotiations are pending, the writing which perpetuates the evidence, is supposed to contain the whole contract. But where a continued misapprehension of material facts has been induced on the part of one, by the misrepresentations of the other, it is obvious that the execution of the writing ought not to extinguish the right of the injured party to show the fraud by which his assent to the contract was obtained. This is a particular head of equitable relief; in affording which it is said a deed cannot be set aside in part for fraud; but that it must be set aside in toto, even though innocent persons are interested under it. In our practice, the defence is considered as resting on the ground of want of consideration as a consequence of the fraud; and the relief is then only commensurate with the actual want of consideration.

But, in general, where a bond is given for the purchase money of land, and, before payment, it is discovered, that there are incumbrances existing, the plaintiff cannot recover, without deducting the amount of the incumbrances, although he has made a conveyance to the defendant with general warranty; but, where the incumbrances, with all the circumstances attending them, are known both by vendor and vendee, and the vendee takes from the vendor a deed, warranting particularly against those in-

cumbrances, and gives his bond for the purchase money, it is no defence in an action on the bond, to say, that the incumbrances were still existing. This was settled by the Court, Tilghman, C. J. in Fuhrman v. Loudon, 13 S. & R. 386, which was a case of legacies charged on the land.

In Morris v. Buckley, 11 S. & R. 168, where a scire facias was sued for the purpose of recovering the purchase money of land under a mortgage, which was claimed by another, whose title had been adjudged good as respected the mortgagor; held, that it was sufficient for the defendant to execute a release on receiving payment for the partial failure of title; and that there was no necessity to tender a conveyance.

## (\*)CHAPTER IV.

OF THE CONSEQUENCES OF THE CONTRACT.

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#### SECTION I.

Of the Rule in Equity, that the Purchaser is entitled to the Estate from the Time of the Contract.

Equity looks upon things agreed to be done, as actually performed(a), (I)(114); consequently, when a contract is made for sale of an estate, equity considers the vendor as a trustee for the purchaser of the estate sold(b), and the purchaser as a trustee of the purchase-money for the vendor(c).

Therefore the contract will not be discharged by the bankruptcy of either the vendor(d) or vendee(e), (II).

- (a) Francis's Maxims, max. 13; 1 Trea. Eq. chap. 6, sec. 9. See Callaway v. Ward, 1 Ves. 318, cited.
- (b) Atcherley v. Vernon, 10 Mod. 518; Davie v. Beardsham, 1 Cha. Ca. 39; and Lady Fohaine's case, cited *ibid.*; and see 1 Term Rep. 601; and Green v. Smith, 1 Atk. 572.
  - (c) Green v. Smith, ubi supra; Pollexfen v. Moore, 3 Atk. 272.
- (d) Orlebar v. Fletcher, 1 P. Wms. 737. The observation in Goodwin v. Lightbody, 1 Dan. 156, appears to be inaccurate.
- (e) See 3 Ves. jun. 255; and Bowles v. Rogers, 6 Ves. jun. 95, n.; Whitworth v. Davis, 1 Ves. & Bea 545.

<sup>(</sup>I) A lessee insured his house, the lease expired, and he contracted for a new lease. Then the house was burned, and the office insisted that at the time of burning it was not the plaintiff's house; but Lord Chancellor King, and afterwards the House of Lords, held otherwise. See printed cases, Dom. Proc. 1730.

<sup>(</sup>II) As to the effect of an extent subsequently to a contract, see Rex v. Snow, 1 Price, 220, cited.

<sup>(114)</sup> See Craig v. Leslie, 3 Wheat. 578.

(\*)But an act of bankruptcy, upon which a commission has not issued, will prevent the execution of the agreement, as neither a buyer nor a seller can be assured that a commission may not issue in due time, in which case he could not retain the estate or money against the assignees (f).

The Bankrupt Act, 6 Geo. 4(g), enacts, that if any bankrupt shall have entered into any agreement for the purchase of any estate or interest in land, the vendor thereof, or any person claiming under him, if the assignees of such bankrupt shall not (upon being thereto required) elect whether they will abide by and execute such agreement, or abandon the same, shall be entitled to apply by petition to the Lord Chancellor, who may thereupon order them to deliver up the said agreement, and the possession of the premises, to the vendor, or person claiming under him, or may make such other order therein as he shall think fit.

The death of the vendor or vendee before the conveyance(h) or surrender(i), or even before the time agreed upon for completing the contract, is in equity immaterial(k).

If the vendor die before payment of the purchasemoney, it will go to his executors, and form part of his assets(l); and even if a vendor reserve the purchasemoney, payable as he shall appoint by an instrument,

<sup>(</sup>f) Lowes v. Lush, Franklin v. Lord Brownlow, 14 Ves. jun. 547, 550.

<sup>(</sup>g) c. 16, s. 76.

<sup>(</sup>h) Paul v. Wilkins, Toth. 106.

<sup>(</sup>i) Barker v. Hill, 2 Cha. Rep. 113.

<sup>(</sup>k) Winged v. Lefebury, 2 Eq. Ca. Abr. 32, pl. 43; cases cited ante, n. (b).

<sup>(1)</sup> Sikes v. Lister, 5 Vin. Abr. 541, pl. 28; Baden v. Earl of Pembroke, 2 Vern. 213; Bubb's case, 2 Freem. 38; Smith v. Hibbard, 2 Dick. 712; Foley v. Percival, 4 Bro. C. C. 419; and see Gilb. Lex Praetor. 243.

<sup>(\*172)</sup> 

executed in a particular manner, and afterwards exercise (\*) his power, the money will, as between his creditors and appointees, be assets(m).

If the estate is under a contract for sale at the date of the will, a devise of it to be sold for a charity, will not give the purchase-money to the charity, in consequence of the mortmain act, as it is called (n), although this point was in the first instance otherwise decided (o)(115).

A vendee being actually seised of the estate in contemplation of equity, must, as we shall hereafter see, bear any loss which may happen to the estate between the agreement and conveyance, and will be entitled to any benefit which may accrue to it in the  $\operatorname{interim}(p)$ ; but if he obtain possession of the estate before he has paid the purchase-money, and begin to cut timber, equity will grant an injunction against  $\operatorname{him}(q)$ .

If the purchaser was tenant at will of the estate, the contract determines the tenancy. And even if he was tenant for a term certain, the agreement determines the relation of landlord and tenant, and in equity, at least, the landlord cannot call for rent(r).

It is a consequence of the same rule, that a purchaser may sell or charge the estate, before the conveyance is executed(s)(116); but a person claiming under him must

- (m) Thompson v. Towne, 2 Vern. 319; 466.
- (n) Harrison v. Harrison, 1 Russ. and Myl. 71; 1 Taunt. 273.
- (o) Middleton v. Spicer, 1 Bro. C. C. 201.
- (p) See post, ch. 5.
- (q) Crockford v. Alexander, 15 Ves. jun. 138.
- (r) Daniels v. Davison, 16 Ves. jun. 249.
- (s) Seton v. Slade, 7 Ves. jun. 265; and see 1 Ves. 220; and 6 Ves. jun. 352. Wood v. Griffith, 12 Feb. 1818. MS. see post.; 2 Ball & Beat. 522.

<sup>(115)</sup> See Baptist Association v. Hart's Exrs. 4 Wheat. 1; and note I. of the appendix to the same volume, on the subject of charitable bequests, where the principal authorities relating to charities are collected.

<sup>(116)</sup> See Barton v. Rushton, 4 Des. 373.

submit to perform the agreement in toto, or he cannot be relieved(t).

(\*) So he may devise the estate, if freehold(u)(117), before the conveyance; and if copyhold, before the surrender(w); and that although the estate is contracted for at a future day(x), or the contract is entered into by a trustee for him(y); and the devisee will be entitled to have the estate paid for out of the personal estate of the purchaser(z)(118).

If a contractor for an estate by his will give a legacy, which he directs to be raised by sale of the estate, and the contract is afterwards vacated, the legacy will be payable out of the general assets(a).

The rule that an estate contracted for may be devised before it is conveyed or surrendered to the purchaser, has now become a land-mark, and could not be shaken without endangering the titles to half of the estates in the kingdom. The applicability of the rule to freehold estates

- (t) See Dyer v. Pulteney, Barnard. Rep. Cha. 160; a very particular case.
- (u) Darris's case, 3 Salk. 85; Milner v. Mills, Mose. 123; Alleyn
  v. Alleyn, Mose. 262; Atcherley v. Vernon, 10 Mod. 518; Gibson v.
  Lord Montfort, 1 Ves. 485.
- (w) Davie v. Beardsham, 1 Cha. Ca. 39; Nels. Cha. Rep. 76; 3
  Cha. Rep. 2; Greenhill v. Greenhill, 2 Vern. 679; Prec. Cha. 329;
  Atcherley v. Vernon, 10 Mod. 518; Robson v. Brown, Oct. 1740, S.
  P.; and see 9 Ves. jun. 510.
- (x) Commissioner Trimuel's case, Mose. 265, cited; and see Atcherley v. Vernon, 10 Mod. 518; Gibson v. Lord Montfort, 1 Ves. 485.
  - (y) Greenhill v. Greenhill, 2 Vern. 679.
- (z) Milner v. Mills, Mose. 123; Broome v. Monck, 10 Ves. jun. 597.
- (a) Fowler v. Willoughby, 2 Sim. and Stu. 354. Qu. When was the contract rescinded? The legacy was considered a demonstrative one.

<sup>(117)</sup> See M'Kinnon v. Thompson, 3 Johns. Ch. Rep. 307, 310. Livingston v. Newkirk, 3 Johns. Ch. Rep. 312, 316.

<sup>(118)</sup> See Livingston v. Newkirk, 3 Johns. Ch. Rep. 316.

<sup>(\*174)</sup> 

has, I believe, never been questioned, but in Ardesoife v. Bennet(b), where the point arose as to a copyhold estate, Sir Thomas Sewell decided the case on another ground, and appears to have avoided sanctioning the rule in question; and in a manuscript note of this case by the name of Wilson v. Bennet, it is said that the Master of (\*)the Rolls was of opinion that the copyhold estate did not pass by the will. This opinion was clearly extra-judicial, and cannot be deemed subversive of the numerous cases which have established the contrary doctrine; and, indeed, in a case before Sir Thomas Sewell, a few years after that of Ardesoife v. Bennet, he seems to allude to a devise of a copyhold estate contracted for, as sanctioned by practice(c).

An estate contracted for will pass by a general devise of all the lands purchased by the testator, although he may have purchased some estates which have been actually conveyed to him, and would therefore of themselves satisfy the words of the will(d).

On the other hand, it seems that estates recently purchased and actually conveyed, will pass with estates contracted for, by a general devise of all the manors, &c. for the purchase whereof the testator has already contracted and agreed(e)(I). But a devise of estates "for the purchase whereof the testator has only contracted and agreed," would not pass estates actually conveyed to him

<sup>(</sup>b) 2 Dick. 403; and see 15 Ves. jun. 391, 392, n.

<sup>(</sup>c) Floyd v. Aldridge, 1777, 5 East, 137, cited; and see Vernon v. Vernon, 7 East, 8.

<sup>(</sup>d) Atcherly v. Vernon, 10 Mod. 518.

<sup>(</sup>e) St. John v. Bishop of Winton, Cowp. 94; Lofft, 113, 349, S. C.; and 2 Blackst. 930.

<sup>(</sup>I) This, however, must depend upon the particular circumstances of each case. The case referred to can scarcely be cited as a binding authority establishing a general rule. It seems that the House of Lords was taken by surprise in affirming the judgment.

before the will, unless perhaps they were recently purchased, and the testator had not contracted for any other estate.

If a man possessed of a term of years contract for the purchase of the inheritance, the term, by construction of equity, instantly attends the inheritance; and therefore, by a devise of the estate subsequently to the contract, the (\*)fee-simple would pass, although not actually conveyed, and the term as attendant on it(f).

And if the purchaser had, previously to the purchase, made his will, by a general bequest in which the term would have passed, yet the legatee will not be entitled to it, although the bequest be not expressly revoked; because the term, by the construction of equity, attended the inheritance immediately on the purchase of the fee, and it must therefore follow it in its devolution on the heir or devisee(g).

The relation of vendor and purchaser in such a case, where it is formed by a conveyance of the inheritance, puts an end to the covenants, though ever so large and general, which existed between lessor and lessee(h).

The same rule, it seems, must prevail where the term is even specifically bequeathed; for if the fee had been actually conveyed, the conveyance would have operated as a revocation(i); and as the vendee is seised of the fee in contemplation of equity, although the conveyance be not executed, the same rules ought to be adhered to in each case.

Although the estate may, subsequently to the will, be

<sup>(</sup>f) Per Sir Wm. Grant, in Capel v. Girdler, Rolls, 16 May 1804, MS.; 9 Ves. jun. 509; Cooke v. Cooke, 2 Atk. 67.

<sup>(</sup>g) Capel v. Girdler, ubi sup.

<sup>(</sup>h) See 1 Bligh, 69.

<sup>(</sup>i) Galton v. Hancock, 2 Atk. 424, 427, 430.

<sup>(\*176)</sup> 

conveyed, or surrendered, either to the purchaser(k), or to a trustee for him(l), yet that will not operate as a revocation of his will(1). The legal estate will of course descend to

- (k) Parsons.v. Freeman, 3 Atk. 741; Amb. 116; and see 1 Ves. jun. 256; 2 Ves. jun. 429, 602; 6 Ves. jun. 220; 8 Ves. jun. 127; and Prideux v. Gibbin, 2 Cha. Ca. 144.
- (l) Jenkinson v. Watts, Lofft, 609, reported; cited nom. Watts v. Fullarton, Dougl. 718; Rose v. Cunynghame, 11 Ves. jun. 550.
- (I) In Brydges v. Duchess of Chandos, 2 Ves. jun. 429, Lord Rosslyn, in treating of this point, said, "Another case is supposed to arise, in which this Court determines upon a principle of equity, it is not said directly against the rule of law, but without attending to what the law would be; that is the case where an equitable estate is devised, and after the will the legal estate is taken, the Court has said that does not revoke the will. It is difficult to state that, at this time of day, in a court of law, which could not look at the equitable interest, but looks only at the legal; but as the legal interest is only a shadow, the justice of the case is very evident; but it is a decision in conformity to the like case at law. The very case occurred at law in Roll. Abr. 616, pl. 3. Cestui que use, before the statute of uses, devises; afterwards the feoffees made a feoffment of the land to the use of the devisor; and after the statute the devisor dies; the land shall pass by the devise; because, after the feoffment, the devisor had the same use which he had before. That is exactly the case of an equitable estate devised, and a conveyance taken afterwards of the legal estate; and this Court was so far from determining without considering what the rule of law would be, that here is the very point decided by a court of law.

The case referred to is thus stated in Rolle:—" Si home aiant feffees a son use devant le statut de 27 H. 8. ust devise le terre al auter, et puis les feffees font feffment del terre al use del devisor et puis le statut le devisor morust, le terre passera per le devise, car après le feffment le devisor avoit mesme l'use que il avoit devant."

The case then appears to be this. The cestui que use made his will, and the feoffees afterwards made a feoffment of the lands to his use; that is, enfeoffed other persons to the use of him. This appears by the reason given for the decision, namely, "because after the feoffment the devisor had the same use which he had before." Whereas, if the facts of the case were as Lord Rosslyn supposed, the devisor would, before the feoffment, have been a mere cestui que use, entitled at law to neither jus in re, nor jus ad rem; and after the feoffment he would have been

(\*)the heir at law, and he will in equity be deemed a mere trustee for the devisee, unless the devisee, thinking the

actually clothed with the legal seisin of the estate; the case, therefore, seems only a decision, that where a man devises an equitable estate, a transfer of the legal estate to other persons, in trust for him, is not a revocation of his will. And such is still the rule of law (Doe v. Pott, Dougl. 2d edit. 710.) as well as of equity, Jenkinson v. Watt, Lofft, 609.

It may, however, be objected, that the devisor did not die till after the statute of uses; and therefore admitting the force of the foregoing remarks, it still appears that the legal estate was, by the operation of the act, vested in the devisor. To this it may be answered, that the statute was expressly passed to prevent alienation of estates by devise, although it declared that wills made before the statute, by persons who were or should be dead before the 1st of May 1536, should not be invalidated by the act. We must therefore presume that the devisor died before that time; otherwise the will would have been void by virtue of the act itself, as was expressly decided in a case where cestui que use before the statute devised the use; and then came the statute, which transferred the use into possession; and although the testator survived the statute of wills, yet the operation of the statute of uses was holden to be a revocation, because the use was thereby gone. 1 Roll. Abr. 616, (R.) pl. 2; Putbury v. Trevalion, Dyer, 142, b.—Indeed the statute of uses could not have come in question in the above case, if the feoffment had been made to the devisor himself.

Lord Hardwicke seems to have construed the case in Rolle in the same manner as Lord Rosslyn did, (see Sparrow v. Hardcastle, 3 Atk. 798; Ambl. 224), although he appears to have been struck with the reason given for the decision; in explanation of which, he is in Atkyns stated to have said, "The use at law was the beneficial and profitable interest, the same as a trust in equity, and which remained in the same manner after the feoffment as before, and the feoffees there granted the dry legal estate to the devisor." In Ambler, his Lordship is reported to have said, "Thus the law considers two interests in the land: the legal estate, and the use: now the use remains the same at the making the devise, and at the death of the devisor; and therefore accepting the grant of the feoffees makes no alteration in it."

Lord Hardwicke's attempt to reconcile what he conceived to be the decision in this case, with the reason given for it, evinces the impossibility of making them consistent. According to his argument, the equitable interest was not merged by its union with the legal estate, but still subsisted in the contemplation of law.

In the case of Willet v. Sandford, 1 Ves. 186, Lord Hardwicke (\*177)

estate did not pass by the will, permit the heir to take the estate, and acquiesce in this for a long while; in which case equity will not relieve him(m).

- (\*)But in analogy to the decisions upon legal estates(n) it has been held, that a devise of a freehold estate contracted for, is revoked by a subsequent conveyance to the (\*)usual uses to bar dower(o), even where the contract was by parol(p), but it is difficult to say, in the latter case, that a conveyance to the usual uses to bar dower is not within the contract of the parties. If, however, it were stipulated in the contract that the estate should be conveyed to the purchaser in fee, or to such uses as he should appoint, a conveyance to uses to bar dower, would not, it is apprehended, operate as a revocation of the will.
- (\*n) Davie v. Beardsham, 1 Cha. Ca. 39; and see Pigott v. Waller, 7 Ves. jun. 98.
- (n) See Tickner v. Tickner, 3 Atk. 742, cited; Kenyon v. Sutton, 2 Ves. jun. 600, cited; and Nott v. Shirley, *ibid.* 604, n.; and see 2 Ves. jun. 429, 600; 6 Ves. jun. 219; 8 Ves. jun. 115, 211; 10 Ves. jun. 249, 256. See also Luther v. Kidby, 3 P. Wms. 170, n. and observe the distinction.
- (o) Rawlins v. Burgis, 2 Ves. & Bea. 382. There was an appeal to the Lord Chancellor, which was for particular reasons withdrawn. It is a point of great interest and nicety.
  - (p) Ward v. Moore, 4 Madd. 368.

classed the different interests in land into three kinds: First, the estate in the land itself; the ancient common-law fee. Secondly, the use; which was originally a creature of equity; but since the statute of uses it draws the estate in land to it; so that they are joined, and make one legal estate. Thirdly, the trust; which the common law takes no notice of, but which carries the beneficial interests and profits into this court, and is still a creature of equity, as the use was before the statute.

This judicious classification proves (what indeed could not be doubted), that the true principles of this subject were familiar to this great master of equity, and that he was led into a false argument by endeavoring to account for a principle which did not exist.

Upon the point in this note, see further, n. (a) to 2 Ves. & Bea. 385, and note(1) to Treat. Powers, 5th edit. p. 155.

(\*178) (\*179)

Estates contracted for after the will, will not pass by it(q)(119); nor will lands pass by the will, although conveyed to the purchaser subsequent to his will in pursuance of a contract prior to the will, unless it was a valid binding contract(r). But in these cases the heir at law will be entitled to the estate for his own benefit, (\*) and if not paid for, the purchase-money must be paid out of the personal estate of his ancestor(s), and that, although he unite in himself the three characters of vendor, heir, and executor(t). The estate will, however, be assets in the hands of the heir.

So if the purchaser die intestate, the heir will in like manner be entitled to have the estate purchased for him(120): and if his ancestor die before the conveyance

- (q) Langford v. Pitt, 2 P. Wms. 629; Alleyn v. Alleyn, Mose. 262;
  Potter v. Potter, 1 Ves. 437; and see 1 Atk. 573; White v. White, 2
  Dick. 522; Reg. Lib. B. 1775, fol. 650.
  - (r) Rose v. Cunynghame, 11 Ves. jun. 50.
- (s) Milner v. Mills, Mose. 123; and see 2 P. Wms. 632; 3 P. Wms. 224; Broome v. Monck, 10 Ves. jun. 597.
  - (t) Coppin v. Coppin, Sel. Cha. Ca. 28; 2 P. Wms. 291.

<sup>(119)</sup> See Jackson v. Potter, 9 Johns. Rep. 312. Jiggits v. Maney, 1 Murph. 258. Johnson v. Hanley, Tay. 305. Cogdell v. Cogdell, 3 Des. 346. Livingston v. Newkirk, 3 Johns. Ch. Rep. 312. Smith v. Codrington, 8 Cranch, 66. M'Kinnon v. Thompson, 3 Johns. Ch. Rep. 307. Burke v. Young's Les. 2 Serg. & Rawle, 387. Under the statute of Virginia, relating to wills, after acquired lands may pass by will, provided such be the clear intention of the testator. Smith v. Codrington, ut supra. It is a rule of the common law, that a will, as to lands, speaks at its date, and as to personal property, at the time of the testator's death. Id.

<sup>(120)</sup> Champion v. Brown, 6 Johns. Ch. Rep. 398, 402. Livingston v. Newkirk, 3 Johns. Ch. Rep. 312.

<sup>&</sup>quot;In Pennsylvania, having no Court of Equity, we are compelled to consider that as done, which Chancery would enforce the performance of, and this is the reason why an action of ejectment may be supported in this state on an equitable title. Per Gibson, J. in Vincent v. Huff, 4 S. & R. 301. Therefore, where one has contracted for the purchase (\*180)

is executed, the heir may devise, charge, or sell the estate, in the same manner as the ancestor himself might have done(u).

If the executor complete the purchase, and take the conveyance in his own name, he will be a trustee for the heir or devisee(v). And if the assets cannot be got in, and the real representative pay for the land out of his own pocket, he may afterwards call upon the personal estate to reimburse him(x). So, if the personal estate is insufficient to perform the contract, and the agreement

- (u) Langford v. Pitt, 2 P. Wms. 629.
- (v) Alleyn v. Alleyn, Mose. 262.
- (x) See 10 Ves. jun. 614, 615.

of land, paid the money and received possession, he is regarded in the light of a vendee with a deed executed and delivered to him. Moody v. Vandyke, 4 Binn. 41. But, where the plaintiff claiming under an equitable title, had been in possession; and had made improvements; but had not paid or tendered the purchase money; and the Court at the trial laid it down in general terms only, that if the purchase money was paid, the plaintiff might recover, yet because the converse of the proposition was not stated to the jury, the Court ordered a new trial. 4 S. & R. 298, supra.

The point decided in Harris v. Bell, 10 S. & R. 39. was, that if no time be stipulated in the agreement for the sale in respect to the possession; but the vendee is permitted by the vendor to take possession before the time agreed upon for the payment of the money; the money not being paid, the vendor forcibly regains the possession: held, that the vendee was entitled to recover the possession without a previous tender of the purchase money, on the ground, that the vendor having put the vendee into possession before payment of the money, it amounted to a waiver of the payment. But ejectment is in the nature of a bill for specific performance; but if the vendee declines paying the purchase money; and the time has elapsed, the vendor can recover the possession. The remedies for vendor and vendee, are mutual; for ejectment will lie against vendor by vendee on articles of agreement, after tender of the purchase money. 4 Binn. 177. And where the vendee has paid part of the money; and declined payment of the residue, still the vendor may recover in ejectment in such case. Martin v. Willink et al. 7 S. & R. 297.

is on that account rescinded, yet the heir or devisee will, it should seem, be entitled to the personalty as far as it extends. And it has been decided, that if by reason of the complication of the testator's affairs, the purchase-money cannot be immediately paid, and the vendor for that reason rescinds the contract, yet on the coming in of the assets, the devisee of the estate contracted for may compel the executor to lay out the purchase-money in the purchase of other estates for his benefit (y).

But if the heir not being entitled to have the estate paid for out of the personal estate, actually obtain and (\*)apply the personal estate in payment of the purchasemoney, the persons entitled to the personal estate will not be entitled to the land, but only to a charge on it for the amount of the money wrongly applied(z).

Any codicil executed according to the statute of frauds will amount to a re-publication of a prior will of lands; and therefore, if a purchaser, previously to a contract, make a general devise of all his lands, and after the contract execute a codicil, according to the statute of frauds, unless an intention appear not to affect it(a), the after-purchased estate will pass under the devise in the will(121),

- (y) Whittaker v. Whittaker, 4 Bro. C. C. 31; Broome v. Monck, 10 Ves. jun. 597. Vide infra. See Mark v. Willington, 1 Beatty, 128.
- (z) Savage v. Carroll, 1 Ball. & Beatty, 265. See post, ch. 15, s. 3.
- (a) Lady Strathmore v. Bowes, 7 Term. Rep. 482; 2 Bos. & Pull.
  500; Smith v. Dearmer, 3 You. & Jerv. 278. Monypenny v. Bristow, 2 Russ. & Myl. 117.

<sup>(121)</sup> The republication of a will, to be effectual to pass lands acquired subsequently to the will, must be attended with all the legal formalities. Jackson v. Potter, 9 Johns. Rep. 312. Jackson v. Holloway, 7 Johns. Rep. 394. See Burke v. Young's Les. 2 Serg. & Rawle, 387. In South Carolina, so far as regards personal property acquired after the will, a republication need not be in writing, or in any particular form; but the rule in regard to real estate is otherwise. Cogdell v. Cogdell, 3 Des. 366.

although legacies only are given by the codicil, and no notice is taken of the estate(b).

It has been thought that this rule would not apply where the devise in the will is of "the estates of which I am now seised;" but the codicil makes the will speak as from the date of the codicil, and therefore there seems to be no solid ground for the supposed distinction.

And if a purchaser, previously to a contract, by a will duly executed according to the statute, direct his afterpurchased lands to be conveyed to the uses of his will and make a provision for his heir at law, and afterwards die without republishing his will, and the after-purchased lands devolve on the heir at law, equity will put the heir to his election, and not permit him to take both the descended estate, and the provision made for him by the will(c). But to raise a case of election the words (\*) must be unequivocal; and therefore a direction to executors to sell whatever real estates the testator might die possessed of, was held not to mean after-purchased estates(d). And yet a devise and bequest of all my estate, rent and effects, real and personal, which I shall die possessed of, has since been decided to have that operation(e).

In purchasing, therefore, of an heir at law who claims an estate conveyed to his ancestor after the date of his will, the purchaser should be satisfied of three points: viz. 1st, That the contract was not entered into by the testator previously to making his will. 2dly, That no

<sup>(</sup>b) Barnes v. Crowe, 1 Ves. jun. 486; Pigott v. Waller, 7 Ves. jun. 98; Goodtitle v. Meredith, 2 Mau. & Selw. 5; Hulme v. Heygate, 1 Merr. 285.

<sup>(</sup>c) Thellusson v. Woodford, MS. 13 Ves. jun. 209, affirmed in Dom. Proc.; and see Treat. of Powers, ch. 6, sect. 2, div. II.

<sup>(</sup>d) Back v. Kett, 1 Jac. 534. Johnson v. Telford, 1 Russ. & Myl. 244.

<sup>(</sup>e) Churchman v. Ireland, 1 Russ. & Myl. 250.

codicil was afterwards executed by him, according to the statute of frauds, by which the lands, although not in contemplation, passed. And, 3dly, If the will affects to pass all the estates which the vendor might thereafter acquire, that the heir at law does not take any interest under the will.

And here we may observe, that if a man make a disposition by will of all his copyhold estates generally, and afterwards purchase other copyhold estates, and surrender them to the uses declared by his will of and concerning the same(g), the after-purchased estates will pass under the general devise, although the will was not re-published. Therefore, where a copyhold estate has been surrendered to the use of a will, and the purchaser is buying of the heir at law, who claims in the absence of any devise subsequently to the purchase by his ancestor, he must be satisfied that the (\*)estate did not pass under any general devise in a will prior to the purchase. This point is not likely to arise, since the act for rendering a surrender to a will unnecessary(h).

From the time of the contract, the purchaser, and not the vendor, being owner of the estate in equity, it follows, that if a man devise his estate, and afterwards contract for the sale of it, the devise will thereby be revoked in equity(i)(122).

- (f) Heylyn, v. Heylyn, Cowp. 130; Lofft, 604. This point has since been so decided at nisi prius.
- (g) Attorney-general v. Vigor, 8 Ves. jun. 256. See Smart v. Prujean, 6 Ves. jun. 565; and the last ed. of Gilbert on Uses, n.(5), p. 72.
  - (h) 55 Geo. 3. c. 192.
- (i) Ryder v. Wager, and Cotter v. Layer, 2 P. Wms. 332, 623; and see 2 Ves. jun. 436; Vawser v. Jeffrey, 16 Ves. jun. 519; 3 Russ. 479.

<sup>(122)</sup> It is a settled principle in equity, that if a conveyance be only for a partial purpose, as to introduce a charge upon the estate, and does (\*183)

And even where an estate was by a will directed to be sold, and the money to be paid to certain persons, and the testator himself afterwards sold the estate, it was held, that the legatees were not entitled to the money produced by the sale(j).

If, however, an agreement be such as a court of equity will not carry into execution against the representatives, there seems ground to contend that it will not revoke the will, because the agreement can operate as a revocation in equity only; and therefore, if equity will not sustain the agreement in respect of which the will is held to be revoked, there appears to be no solid reason why the devise of the estate should not take effect. In Onions v. Tyrer(k)the Lord Chancellor held, that a second will, devising lands to the same person as the former, and revoking all former wills, but not duly executed, should never revoke the former will so as to let in the heir; nay, if by the latter will the premises in question had been given to a third person, it should never have let in the heir, in regard the meaning of the second will was to give the second devisee what it had taken from the first, without any consideration (\*) had to the heir; and if the second devisee took nothing, the first would have lost nothing.

These principles ought, perhaps, to be referred to the words of the statute of frauds(l); but still as an agreement is only an equitable revocation, the same reasoning applies to the case before us. Where a man contracts for the sale of his estate, he intends to increase his personal

<sup>(</sup>j) Arnald v. Arnald, 1 Bro. C. C. 401; 2 Dick. 645. Kenbold v. Roadknight, 1 Russ. & Myl. 677; 1 Toml. 492.

<sup>(</sup>k) 1 P. Wms. 345. See 7 Ves. jun. 379.

<sup>(1)</sup> See Pow. Dev. 641.

not affect the interest of the testator beyond that special purpose, it is only a partial revocation of the will; and equity will hold the party a trustee, not for the heir, but for the devisee. Livingston v. Livingston, 3 Johns. Ch. Rep. 155. per KENT.

estate, and not to benefit his heir; and if the Court will not carry the agreement into a specific execution for the benefit of the personal estate, "the personal estate takes nothing, and the devisec can have lost nothing."

In the two cases (m) in which it has been holden, that an agreement will revoke a will in equity, it makes a term of the proposition, that the agreement amounts in equity to a conveyance. And it should seem that Lord Eldon was of this opinion, for in Knollys v. Alcock (n), where it was contended that an agreement in equity is a revocation only where it can be performed, his Lordship did not deny the rule as stated, but showed, that the agreement in that case was such as equity would perform (o), (1); and in Clynn v. Littler (p), Lord Mansfield laid it down, that covenants had never been allowed to be revocations, unless where the covenantee has a right to a specific performance.

(\*) Whether an abandonment of an agreement will prevent the contract from operating as a revocation of a prior will, seems to be a more doubtful point. In the case of Knollys v. Alcock, before referred to, it was also contended, that an agreement which was abandoned was not a revocation in equity; but Lord Eldon said, he did not admit, that if there is an agreement in equity which at the moment is a completely operative revocation, a subsequent abandon-

(m) Ryder v. Wager, and Cotter v. Layer, ubi sup.

(p) 1 Blackst. 345.

(\*185)

<sup>(</sup>n) 7 Ves. jun. 558. There was an appeal from the decision in this case, which has been compromised; and see Mayor v. Gowland, 2 Dick. 563. See also 2 Ves. jun. 436.

<sup>(</sup>o) See Savage v. Taylor, Cases T. Talb. 234.

<sup>(</sup>I) It appears by an abstract of the title to the estate, in respect of which the litigation in Savage v. Taylor was commenced, that the heir at law of the testator, in his answer to the bill of the devisee, insisted that if the will was originally valid, yet it was revoked by the articles for sale, although the Court ought not to carry them into execution.

ment will of necessity set up the will. His Lordship added, that he did not say whether it would be so or not, for he was of opinion he could not raise the question in the case before him, as the agreement was never abandoned. Sir Wm. Grant upon the same point said, that he very much doubted whether the abandonment of the contract in the testator's life-time would set up the will without a republication. But where the will is revoked at the testator's death by the contract, of course no subsequent event can render the will operative and effectual (q). In the first case in the books(r), in which the question arose whether a covenant to convey an estate devised should operate at law as a revocation of the will, it was holden, that such a covenant without more, was not any revocation of the will; because perhaps the devisor's intention would alter before performance of the covenant. At law, therefore, a contract does not revoke the will; but a conveyance in pursuance of the contract would of course operate as a revocation, or to speak more technically, as an ademption. Now it may be contended, that the same rule must prevail in equity, and that a contract for sale ought not to affect the validity of a prior will, until it is carried into execution, or, which in equity is tantamount to a conveyance, until the Court decree a specific performance of it. (\*) While an agreement rests in fieri, and the validity of it has not been acknowledged by a decree, it seems equitable that the owner should be at liberty, with the concurrence of the other party, to alter his mind. Indeed in the absence of intention there seems to be no weighty distinction between an agreement which has been abandoned, and an agreement which equity will not perform. If a man make a second will without expressly revoking the first, and afterwards cancel the second will, the first is revived.

<sup>(</sup>q) Bennett v. Lord Tankerville, 19 Ves. 170.

<sup>(</sup>r) Montague v. Jefferies, 1 Ro. Abr. 615, (P.) pl. 3.

the second will being considered only intentional(s); and although it is true that a will is ambulatory till the death of the testator, yet the same ground may be taken in support of a will impliedly revoked by an agreement afterwards abandoned. Why should not a mere agreement be deemed ambulatory till it is completed, when it is clear that the parties may rescind the agreement, and the estate of the devisor is not altered so as to effect a revocation at law?

The seller after the contract and before the conveyance is not considered so absolutely a trustee as to prevent the estate from passing by a devise by him, subsequently to the contract, of his real estate to trustees to sell(t). But where an estate under contract was devised expressly by name, it was held that the legal estate only passed to enable the devisee to carry the contract into execution, and that the devisee was not entitled to the purchase-money beneficially(u). The principle of this decision will necessarily furnish many exceptions to the rule laid down in the case of Wall v. Bright.

When an estate is contracted to be sold, it is in equity (\*)considered as converted into personalty from the time of the contract(I); and this notional conversion takes

- (s) Goodright v. Glazier, 4 Burr. 2512.
- (t) Wall v. Bright, 1 Jac. & Walk. 490.
- (u) Knollys v. Shepherd, 1 Jac. & Walk. 499, cited. This case was affirmed in 1825 in Dom. Proc. MS. The decision depended upon the particular terms of the devise.

<sup>(</sup>I) The decision in the case of Foley v. Percival, 4 Bro. C. C. 419, seems to depend on the personal estate having been charged with the legacies; and the dictum of the Lord Chancellor, that an estate contracted to be sold, is not converted into personalty, where it will disappoint the testator's intention as to the payment of legacies charged upon the estate by his will, appears not to be warranted by either principle or authority. The case of Comer v. Walkley, 2 Dick. 649, is misreported. See post, ch. 9.

place, although the election to purchase rests merely with

the purchaser(v)(123).

Thus in a case before Lord Kenyon, at the Rolls(x), Whitmore demised to Douglas for seven years, with a covenant, that if the tenant, after the 29th of September 1761, and before the 29th of September 1765, should choose to purchase the inheritance for 3,000l., Whitmore would convey to him(II). In 1761, before any election, Whitmore died, and left all his real estate to Bennett in fee, and all his personal estate to Bennett and his sister equally. In 1765, before the time mentioned, Waller, who purchased the lease and benefit of the agreement from Douglas, called on Bennett to convey for 3,000l.; which conevyance was made in consideration of that sum. Afterwards the sister and her husband filed a bill against the representative of Bennett, claiming a moiety of the 3,000l. and interest, and it was decreed accordingly.

This case has been recently followed by Lord Eldon(y). But it must be observed, that until the option is declared, the rents belong to the heir or devisee.

Upon the same principle it has been determined, that

<sup>(</sup>v) Lawes v. Bennett, 7 Ves. jun. 436; 14 Ves. jun. 596, cited; S. C. cited, 16 Ves. 253, 254, nom. Douglas v. Whitrong; Ripley v. Waterworth, 7 Ves. jun. 425.

<sup>(</sup>x) Whitmore's case, ubi sup.

<sup>(</sup>y) Townley v. Bedwell, 14 Ves. jun. 19.

<sup>(</sup>II) As to rights of pre-emption given by will, and the mode in which they will be carried into execution, see Earl of Radnor v. Shafto, 11 Ves. jun. 448; as to a right of pre-emption of timber, which a lessee is authorized to cut down, see Goodtitle v. Saville, 15 East, 87.

<sup>(123)</sup> See Craig v. Leslie, 3 Wheat. 563, 577. Postell v. Postell's Exrs. 1 Des. 173. And where the whole beneficial interest in the land in one case, or in the money in the other, belongs to the heir, or devisee, as the case may be, a court of equity will permit him to take the money or the land, at his election, if he elect before the conversion is made. Craig v. Leslie, 3 Wheat. 578.

(\*)if a man having a timber estate, agree to sell a given quantity per annum, to be chosen by the buyer, although the owner die, and the option is in the buyer, yet the timber cut after the owner's death, however large in quantity, will be part of his personal estate(z).

The rule established by these decisions must frequently subvert the vendor's intention; where, therefore, a vendor intends the estate, as between his real and personal representatives, to be deemed real estate, a declaration to that effect should be inserted in the agreement for sale.

Disputes also often arise between the real and personal representatives, where a person purchases an equity of redemption; the real representative mostly claiming to have the mortgage money paid off out of the personal estate, and the personal representative resisting the demand. Unless the mortgage money form part of the consideration money for the estate, or the purchaser, by communication with the mortgagee, clearly take the mortgage debt on himself, as between his heir and executor, it will be considered a charge on the land; the mere covenanting with the mortgagor to pay the debt, will not make it his personal debt; and consequently his personal estate, as between the heir and executor, will only be the auxiliary fund for payment of it(a)(124).

In cases of this nature equity always adverts to the intention of the purchaser, and disputes on this subject may therefore be prevented, by the insertion of a short declaration in the purchase-deed, whether the personal estate of the purchaser shall or shall not, as between his

<sup>(</sup>z) See 7 Ves. jun. 437.

<sup>(</sup>a) On this point see Evelyn v. Evelyn, 2 P. Wms. 659; and the cases in Mr. Cox's note; to which add, Hamilton v. Worley, 2 Ves. jun. 62; Woods v. Huntingford, 3 Ves. jun. 128; Buller v. Buller, 5 Ves. jun. 517; Waring v. Ward, 5 Ves. jun. 670; and 7 Ves. jun. 332; and Lord Oxford v. Lady Rodney, 14 Ves. jun. 417.

<sup>(124)</sup>  $\it Duke\ of\ Cumberland\ v.\ Codrington, 3\ Johns.\ Ch.\ Rep.\ 229.\ (*188)$ 

heir and executor, be the primary fund for payment of the mortgage money.

(\*)But (to return to the point under consideration) if upon the death of the vendor a title cannot be made, or there was not a perfect contract, or the Court should think the contract ought not to be executed, in all these cases there is no conversion of real estate into personal in consideration of the Court, upon which the right of the executor on the one hand, and of the heir or devisee on the other, depends; and therefore the estate will go to the heir at law of the vendor, in the same manner as if no contract had been entered into(b), and the heir or devisee of the purchaser will not be entitled to the money agreed to be paid for the lands, or to have any other estate bought for him(c). For although the purchaser himself, if alive, might elect to take the estate with the bad title(d), vet where he is dead the Court cannot speculate upon what he would or would not have done; but, in these cases, the inquiry must be, whether at his death a contract existed, by which he was bound, and which he would be compelled to perform. That alone can give the heir of the purchaser a right to call for the personal estate to be applied, or to the personal representative of the vendor. a right to call upon his heir. The question must be the same, whether a purchase or a sale is insisted on. Was the ancestor himself bound? Was there such an agreement as converts the real estate into personal, or the

<sup>(</sup>b) Lacon v. Mertins, 3 Atk. 1; Attorney-general v. Day, 1 Ves. 218; Buckmaster v. Harrop, 7 Ves. jun. 341; and see 8 Ves. jun. 274; Rose v. Cunynghame, 11 Ves. jun. 550; Collier v. Jenkins, 1 Yo. 295.

<sup>(</sup>c) Green v. Smith, 1 Atk. 573; Broome v. Monck, 10 Ves. jun. 597; Savage v. Carrol, 1 Ball & Beatty, 265. Vide supra.

<sup>(</sup>d) Western v. Russell, 3 Ves. & Bea. 187.

personal estate into real ?(e)(I). On this ground it has (\*)been decided, that where a man had a right of preemption of an estate under a will, and did not accept the offer in his life-time, or denote any intention by his will to do so, there was no subsisting contract, by virtue of which the right passed to the real representative, so as to enable him to call upon the personal estate to pay for the estate, as if it had been contracted for (f). So where upon a parol treaty, the purchaser filed his bill for a specific performance of it, and the vendor submitting to perform it, a decree was made, that the purchaser should pay the money into the bank by a given day, or the bill should be dismissed; and the purchaser paid the money according to the decree: in a question between his heir and devisee it was determined, that the estate did not pass by a general devise in his will, which was made prior to the payment of the money(g). It will be observed, that in this case, neither of the parties was bound at the time the bill was filed; and if the purchaser had not paid the money, his bill would have been dismissed, and, in that event, no contract would ever have existed. It was therefore clear, that the inception of the contract was upon payment of the money, and the will, therefore,

- (e) Per Sir Wm. Grant, 7 Ves. jun. 344, 345.
- (f) Earl of Radnor v. Shafto, 11 Ves. jun. 448.
- (g) Gaskarth v. Lord Lowther, 12 Ves. jun. 107.

<sup>(</sup>I) Vide supra, p. 129. Note, in Potter v. Potter, 1 Ves. 438, a bill was filed to compel execution of the parol agreement in the testator's life-time; his agent gave a note for payment of part of the purchase money, and let the estate as he pleased. Possession of the estate must, therefore, have been delivered to him. And the Master of the Rolls expressly said, that the agreement was so far carried into execution, even before the will, as to supply the want of writing. This case, therefore, like the others, only proves, that a binding contract in the testator's life-time will be enforced.

having been made before the contract, could not affect the estate.

But if an estate directed to be bought, but not actually contracted for, is not, or cannot be bought, yet the money must be laid out in other lands, for the benefit of the (\*)devisee(h). And where a testator intends that the devisee of the contracted estate shall have another estate of equal value, in case a good title cannot be made to the one contracted for, an express declaration to that effect should be inserted in the will.

By this time we must have observed, that the foregoing rules, as to the conversion of the estate, apply to those cases only where a court of equity will decree a specific performance: for if equity will not interfere, and the vendee be left to his remedy at law, the rules of law, and not those of equity, must then prevail, and consequently neither the vendor nor his heir would be considered as a trustee for the purchaser, but would only be subject to an action for breach of contract.

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### SECTION II.

# Of Specific Performance.

The preceding observations lead us to inquire, in what cases a court of equity will decree a specific performance; which, for the purposes of this work, may be comprised under two heads. First, with respect to the vendor: Secondly, with respect to the agreement itself.

- I. First, then, if a man, seised in fee-simple, or pur
- (h) Whittaker v. Whittaker, 4 Bro. C. C. 31; and see 2 Atk. 369; Broome v. Monck, 10 Ves. jun. 597. Vide supra.

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autre vie(i), contract for the sale of his estate, and die before the conveyance is executed, his heir at law will be decreed to perform the agreement in specie, although he covenanted for himself only, and not for his heirs(k)(125).

(\*)It was a point of great controversy, whether the 7 Anne, c. 19, enabled an infant heir at law to convey in performance of a contract made by his ancestor. It is now sufficient to refer to the cases (l), for that act was repealed by the 6 Geo. 4, c. 74; but even the latter act was held not to embrace constructive trusts(m). The law now depends upon the 1 W. 4, c. 60, which enables conveyances to be made by committees of trustees and by lunatics, although not found so by inquisition, and by infant trustees; and (n) it provides that every person, being in other respects within the meaning of the act, shall be, and be deemed to be, a trustee within the act, notwithstanding he may have some beneficial estate or interest in the same subject, or may have some duty as trustee to perform. And it expressly enacts(o), that where any land, shall have been contracted to be sold, and the vendor, or any of the vendors, shall have died, either having received the purchase-money for the same, or some part thereof, or not having received any part thereof, and a specific performance of such contract, either

<sup>(</sup>i) Stevens v. Baily, 2 Freem. 199, cited; Nels. Cha. Rep. 106 reported; see Anon. 2 Freem. 155.

<sup>(</sup>k) Gell v. Vermedum, 2 Freem. 199.

<sup>(</sup>l) See Ex parte Vernon, 2 P. Wms. 549; Sikes v. Lister, 5 Vin. Abr. 541, pl. 28; Goodwin v. Lister, 3 P. Wms. 387; S. C. MS.; Hawkins v. Obeen, 2 Ves. 559; Fearne's Posthuma, 236; Jerdon v. Forster, 1 Sand. on Uses, 283, cited, 3d edit. Ex parte Janaway, 7 Price, 679; Smith v. Hibbard, 2 Dick. 730; Oneby v. Price, Fearne's Post. 239.

<sup>(</sup>m) Dew v. Clarke, 4 Russ. 511. King v. Turner, 2 Sim. 550.

<sup>(</sup>n) Sec. 15.

<sup>(</sup>o) Sec. 16.

<sup>(125)</sup> See Glaze v. Drayton, 1 Des. 109.

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wholly or as far as the same remains to be executed, or as far as the same by reason of the infancy can be executed, shall have been decreed by the Court of Chancery(I), in the life-time of such vendor, or after his decease, and where one person shall have purchased in the name of (\*)another, but the nominal purchaser shall on the face of the conveyance appear to be the real purchaser, and there shall be no declaration of trust from him, and a decree of the Court, either before or after the death of such nominal purchaser, shall have declared him to be a trustee for the real purchaser, then in every such case the heir of such vendor, or of such nominal purchaser or his heir, in whom the premises shall be vested, shall be a trustee for the purchaser within the act.

The act then provides (p), that where any land shall have been contracted to be sold, and the vendor or any of the vendors shall have died, having devised the same in settlement, so as to be vested in any person for life or other limited interest, with any remainder, limitation or gift, and which may not be vested, or may be vested in some person from whom a conveyance of the same cannot be obtained, or by way of executory devise, and a specific performance of such contract, either wholly or so far as the same remained to be executed, shall have been decreed by the Court, it shall be lawful for the Court to direct such tenant for life, or other person having a limited interest, or the first executory devisee thereof, to convey the fee-simple or other the whole estate contracted to be sold to the purchaser, or in such manner as the Court shall think proper. The act is then(q) extended to other cases of constructive trusts, but is not to extend to

<sup>(</sup>p) Sec. 17.

<sup>(</sup>q) Sec. 18.

<sup>(</sup>I) The powers are extended to the Court of Exchequer, &c. &c. Sec. 26. 31.

a vendor, except in any case before expressly provided for.

An agreement by a man seised in tail is, of course, binding on himself, but it cannot be enforced against the issue in tail, if the entail was not effectually barred(r), (\*)although the ancestor covenanted for that purpose(s), and received part, or even the whole of the purchasemoney, and a decree was made against him, and he died in contempt, and in prison, for not obeying the decree(t) (I): the ground of which determinations is, that the issue in tail claim per formam doni, from the creator or author of the estate tail; and therefore, though in the power of tenant in tail by a particular conveyance, that not being done, the Court cannot take away the right they derive, not from the tenant in tail, but from the author of the estate tail(u).

A distinction has, however, been taken, where the ancestor is only equitable tenant in tail; and the Court will in that case, it is said, relieve against the issue(v), because equitable estates tail are mere creatures of the Court, and not within the statute de donis; and there certainly seems ground to contend that the Court would compel a specific performance against equitable issue in tail, where a decree has been made in the ancestor's life-time. But as late

<sup>(</sup>r) See 3 & 4 W. 4, c. 74, which abolished fines and recoveries, post. ch. 7.

<sup>(</sup>s) Cavendish v. Worsley, Hob. 203; Ross v. Ross, 1 Cha. Ca. 171; Sale v. Freeland, 2 Ventr. 350; Jenkyns v. Keymes, 1 Lev. 237; which have overruled the dictum in Hill v. Carr, 1 Cha. Ca. 294.

<sup>(1)</sup> Powell v. Powell, Prec. Cha. 278; Weal v. Lower, 2 Vern. 306, cited; Sangon v. Williams, Gilb. Eq. Rep. 104, cited; and see 1 Ves. 224.

<sup>(</sup>u) See 2 Ves. 634.

<sup>(</sup>v) Norcliff v. Warsley, 1 Cha. Ca. 234; Sayle v. Freeland, 2 Ventr. 350; and see 1 Pow. Contr. 126.

<sup>(</sup>I) But now by 1 W. 4, c. 36, s. 15, Rule 15, the Court may itself execute the decree against the tenant in tail in custody for contempt. (\*194)

authorities(w) had settled that an equitable estate tail in freeholds could not before the 3 & 4 W. 4, c. 74, be (\*)barred by a mere deed, but only by a fine or recovery, it seems that equity could not consider such issue to be bound by a mere agreement entered into by their ancestor.

The same observations seemed to apply to legal and equitable estates tail in copyholds, for a legal entail could only before the late act have been barred according to the custom of the manor of which the copyhold estate was holden; and perhaps the better opinion was, that the same steps must have been taken to bar an equitable estate tail in copyholds, as must have been pursued in the case of a legal entail. Lord Hardwicke, however, appears to have thought(x) that a mere surrender was in every case sufficient to bar an equitable estate tail in copyholds; but the contrary opinion was entertained by the Profession, and appeared to be authorized by a case cited in several books from the papers of the late Mr. Powell(y), in which it was held, that a covenant by a tenant in tail in equity of a copyhold, in his marriage settlement, to surrender his copyholds to uses in strict settlement, was not of itself sufficient to dock the equitable entail; for if such an entail be created, a recovery in the court baron is necessary to dock it; it being a rule, that the same steps must be taken to bar an equitable estate in tail, as would be requisite to bar it, were

<sup>(</sup>w) Legate v. Sewell, 1 P. Wms. 91; Harvey v. Parker, 10 Vin. Abr. 266, pl. 6, affirmed in Dom. Proc.; Kirkham v. Smith, Ambl. 318; Radford v. Wilson, 3 Atk. 815; Boteler v. Allington, 1 Bro. C. C. 72; Burnaby v. Griffin, 3 Ves. jun. 266; and see Fletcher v. Tollet, 5 Ves. jun. 13.

<sup>(</sup>x) Radford v. Wilson, 3 Atk. 315; and see the judgment of Lord Chancellor Apsley, in Grayme v. Grayme, 1 Watk. Cop. 180; and see Pow. Contr. 126. See Pullen v. Lord Middleton, 9 Mod. 483.

<sup>(</sup>y) Hale's case, Ch. 11th Dec. 1764; and see Roe v. Lowe, 1 Henry Blackst. 446.

it a legal estate tail(z),(I). Indeed the power of tenants (\*)in tail, to bind their issue, ought to be the same, whether the estate be freehold or copyhold, and whether the entail be legal or equitable; the analogy preserved between legal and equitable estates tail, and between limitations in freehold and copyhold estates, should be adhered to in this instance.

But now, by the 3 & 4 W. 4, c. 74, a surrender is made a sufficient bar of even a legal estate tail, and equitable tenants in tail may bar the entail either by surrender or by deed, accompanied by the solemnities required by the act(a). But in each case the provisions of the act must be complied with, or the issue will not be bound.

And it is expressly enacted, that no disposition by a tenant in tail resting only in contract, either express or implied or otherwise, and whether supported by a valuable consideration or not, shall be of any force(b).

Where by the custom of a manor, and it is the custom of most manors, a tenant is complete master of his estate, independently of his wife, and can by his own act alone bar her free bench; an agreement by him for sale of his estate will be enforced against the wife, if he die before it is carried into execution (c).

But an agreement for sale of a freehold estate could not before the late act have been carried into execution

- (z) And see 1 Walk. Copyh. 181; 1 Preston on Convey. 155.
- (a) Sec. 50-54.
- (b) Sec. 40.
- (c) Hinton v. Hinton, 2 Ves. 631, 638; Ambl. 277; Brown v. Raindle, 8 Ves. jun. 256, which overruled Musgrave v. Dashwood, 2 Vern. 45, 63.

<sup>(</sup>I) Note; this appears to be an extract from Mr. Booth's opinion on this case. The case itself appears to have been decided on the ground that the remainder-man claiming in equity under the covenant for the settlement was a mere volunteer.

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against a widow entitled to dower. The distinction was founded upon this ground; that a husband had it in his power, during his life, to sell his copyhold estates, and thereby bar his wife's expectancy; but if a wife's right to dower once attached on a freehold estate, no act of the husband's alone can divest it. By the late act(d), however, (\*) a wife's dower is put altogether into the husband's power, and it is specially provided, that no widow shall be entitled to dower out of any land which shall have been absolutely disposed of by her husband in his lifetime, and that all partial interests, and all charges created by any disposition of a husband, and all contracts to which his land shall be subject, shall be valid as against the right of his widow to dower.

Equity will enforce an agreement by a joint tenant for sale of his share against the survivor, if the articles amount to an equitable severance of the jointure(e): and a covenant to sell, though it does not sever the joint-tenancy at law, will in equity(f).

An agreement by a *feme covert* for sale of her estate, cannot be enforced either at law or in equity (g)(126), unless the estate be settled to her separate use, so as to enable

- (d) 3 & 4W. 4, c. 105, s. 4, 5.
- (e) Musgrave v. Dashwood, 2 Vern. 45, 63. See 2 Ves. 634.
- (f) See 3 Ves. jun. 257; Frewen v. Relfe, 2 Bro. C. C. 220.
- (g) Emery v. Wase, 5 Ves. jun. 846.

<sup>(126)</sup> See Livingston v. Livingston, 2 Johns. Ch. Rep. 537. A feme covert may mortgage her real estate for her husband's debts. Demarest v. Wynkoop, 3 Johns. Ch. Rep. 129. As to the power of a feme covert to sell or incumber her separate estate, see Ewing v. Smith, 3 Des. 417, 429; where the English decisions on this subject, from 1723 to 1808, are reviewed. A majority of the court considered the question as res integra, and that the decisions of the English chancery had extended the power of married women over their separate estates to a greater length than they were willing to go. See also, as to this question, Methodist Episcopal Church v. Jaques, 3 Johns. Ch. Rep. 77, 86. See Dibble v. Hutton, 1 Day, 221.

her to dispose of it as if she were sole(127); nor will an agreement by her husband bind her(h). Of the incapacity of a married woman, or her husband, to bind her real estate, unless [formerly] by a fine or recovery, there is a striking instance in the year books in the reign of Edward the fourth(i). A woman cestui que use and her husband joined in the sale of her estate; the wife received the money, and she and her husband begged her feoffee to convey the estate to the purchaser, which he accordingly did. The husband died, and then the wife filed a bill against the feoffee for a breach of trust. The cause was (\*)heard in the Exchequer Chamber, before the Chancellor and the judges of both benches, who held, that the sale was in fact the sale of the husband; that the receipt of the money by the wife was immaterial, and the sale was void; that the trustee was answerable for the breach of trust; and as the purchaser knew he was buying a married woman's estate, that the wife might recover the estate from him.

If, however, a husband agree to convey his wife's estate, he will, according to some cases, be compelled to perform the agreement in specie(k); because it has been

<sup>(</sup>h) See Daniel v. Adams, Ambl. 495; 1 Eq. Ca. Abr. 62, pl. 2, side note, which correct the dictum in Baker v. Child, 2 Vern. 61; but see Martin v. Mitchell, 3 Swanst. 413. It was said by Murray, Solicitor-General, and agreed to by Lord Hardwicke, that there was no decree in Baker v. Child, in Reg. Lib., but it was referred to arbitration.

<sup>(</sup>i) 7 E. IV. 14, b.

<sup>(</sup>k) Hall v. Hardy, 3 P. Wms. 187; Barrington v. Horne, 2 Eq. Ca. Abr. 17, pl. 7; Morris v. Stephenson, 7 Ves. jun. 474. See Wheeler v. Newton, Prec. Cha. 16; Haddon's case, Toth. 205; and see Griffin v. Taylor, ib. 106, edit. 1649.

<sup>(127)</sup> See Jaques v. Methodist Episcopal Church, on appeal, 17 Johns. Rep. 548. But see same case, 1 Johns. Ch. Rep. 450. and 3 Johns. Ch. Rep. 77. Bradish v. Gibbs, 3 Johns. Ch. Rep. 523. Bethune v. Beresford, 1 Des. 174.

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said, it is to be presumed that the husband, where he covenants that his wife shall levy a fine, has first gained her consent for that purpose(l); but this does not seem to be the true ground, for although the wife swear by her answer that she never assented to the agreement, yet the husband will not be let off(m). The principle upon which the Court proceeds, seems to be this, that if a person undertakes that another shall do a certain act, he is bound to procure him to perform it; and, therefore, where a father covenanted that his son, who was then under age, should convey lands to a purchaser, he was decreed to procure the son to convey on his coming of age(n), (I).

(\*) There have been instances of committing the husband to the Fleet, until the wife should convey the estate; but if he should make it appear, that he could not prevail on his wife to join, it seems that he must of necessity be discharged, upon placing the vendee in the same situation as if the agreement had never been executed(o).

In a late case(p) Lord Eldon seemed to be of opinion that if this alarming doctrine were perfectly res integra, he should hesitate before he would hold the husband bound to procure the wife to join. His Lordship said, that if a man chooses to contract for the estate of a married

<sup>(1)</sup> Winter v. Devreux, 3 P. Wms. 190, n. (B).

<sup>(</sup>m) Withers v. Pinchard, 7 Ves. jun. 475. cited.

<sup>(</sup>n) Anon. 2 Cha. Ca. 53.

<sup>(</sup>o) See note to Hall v. Hardy, 3 P. Wms. 187; Ortread v. Round, 4 Vin. Abr. 303, pl. 4; S Ves. jun. 510; and Emery v. Wase, 6 Ves. jun. 846; and see Sedgwick v. Hargrave, 2 Ves. 57.

<sup>(</sup>p) Emery v. Wase, 8 Ves. jun. 505; and see 16 Ves. jun. 367; Howell v. George, 1 Madd. 1.

<sup>(</sup>I) And it is no plea to an action at law for breach of the agreement, to say, that the third person had nothing to do with it, or no estate in it, for the defendant hath undertaken to procure it, and must at his peril.—Staughton v. Hawley, M. 1 W. and M. Rot. 662, B. R. judgment in H. after. MS.

woman, or an estate subject to dower, he knows the property is her's altogether, or to a given extent. The purchaser is bound to regard the policy of the law; and what right has he to complain, if she who, according to law, cannot part with her property but by her own free will, takes advantage of the locus pænitentiæ: and why is he not to take his chance of damages against the husband? And after showing the absurdity which must arise by adhering to the contrary doctrine, his Lordship added, that there was difficulty enough to make him pause, before he should follow the two last authorities; and he was not sure, whether it was not proper to have the judgment of the House of Lords, to determine which of the decisions on this point ought to bind us.

And it now seems perfectly clear, that this jurisdiction is to be very sparingly exercised (I), and that equity will (\*)eagerly seize on any reasonable ground as a bar to the aid of the Court(q). Indeed in a late case(r) in the Court of Common Pleas, where an action was brought on a covenant by a husband, that he and his wife would levy a fine, and he could not procure her concurrence, the learned Chief Justice said, that the covenant upon which the action was brought was such as the Court of Chancery would not now enforce; and he added, that nothing could be more absurd than to allow a married woman to be compelled to levy a fine, through the fear of her hubsand being sued and thrown into gaol, when the general principle of the law is, that a married woman shall not be

<sup>(</sup>q) See Ortread v. Round, 4 Vin. Abr. 203, pl. 4; Emery v. Wase, ubi sup.; Daniel v. Adams, Ambl. 495.

<sup>(</sup>r) Davies v. Jones, 1 New. Rep. 267; and see Martin v. Mitchell, 3 Swanst. 425.

<sup>(</sup>I) Upon this expression Lord Eldon observes, that certainly it is very satisfactory to be informed, that it is and it is not to be done. 8 Ves. jun. 516.

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compelled to levy a fine. This observation of Lord Chief Justice Mansfield must have considerable influence on this subject, although, as we have seen, it is not settled that equity will, in every case, refuse to compel the husband to procure his wife's concurrence.

An agreement by a lunatic cannot of course be carried into a specific execution; but the change of the condition of a person entering into an agreement by becoming lunatic, will not alter the right of the parties; which will be the same as before, provided they can come at the remedy. As if the legal estate is vested in trustees, a court of equity will decree a specific performance; and the act of God will not change the right of the parties; but where the legal estate was vested in the lunatic himself, that would formerly have prevented the remedy in equity, and left it at law(s); unless the purchaser was satisfied with the enjoyment of the estate which a decree would give him, and chose to encounter the inconvenience of leaving the legal estate outstanding in the lunatic, in (\*) which case a a specific performance would have been decreed in his favor(t). But this anomaly is now removed by the 1. W. 4, c. 65(u), which provides, that where any person shall have contracted to sell an estate, and shall afterwards become lunatic, and a specific performance of such contract, either wholly or so far as the same shall remain to be performed, shall have been decreed either before or after such lunacy, it shall be lawful for the committee, by the direction of the Lord Chancellor, to convey in pursuance of such decree, and the purchase-money, or so much as remains unpaid, is to be paid to the committee.

If trustees, under a power of sale, make a legal con-

<sup>(</sup>s) Owen v. Davies, 1 Ves. 82.

<sup>(</sup>t) Hall v. Warren, 9 Ves. jun. 605.

<sup>(</sup>u) Sec. 7.

tract for sale of the estate, the contract binds the estate; and though, by the deaths of parties, the power should be extinguished, yet the contract must be executed by those who have got an interest by the extinguishment of the power(x).

If an infant enter into a contract for the sale or purchase of an estate, he cannot enforce it in equity, for the remedy is not mutual(y).

II. Secondly, We are to consider the rules by which equity is guided in granting a specific performance, with reference to the agreement itself.

We shall, in the subsequent chapters of this treatise, have occasion to consider rather at large in what cases equity will or will not enforce a specific performance of an agreement for sale of an estate; and it will in this (\*)place, therefore, be sufficient to state the general rules by which equity is guided in compelling the specific performance of agreements.

The original foundation of these decrees was simply this, that damages at law would not give the party the compensation to which he was entitled; that is, would not put him in a situation as beneficial to him as if the agreement were specifically performed. On this ground the Court, in a variety of cases, has refused to interfere, where from the nature of the case the damages must necessarily be commensurate to the injury sustained (z)(128),

<sup>(</sup>x) Mortlock v. Buller, 10 Ves. jun. 292; and see Shannon v. Bradstreet, 1 Scho. & Lef. 52.

<sup>(</sup>y) Flight v. Bolland, 4 Russ. 298.

<sup>(</sup>z) Errington v. Annesley, 2 Bro. C. Ca. 841; Flint v. Brandon, 8 Ves. jun. 363; Mitf. Pl. 109.

<sup>(128)</sup> See Hepburn v. Dunlop, 1 Wheat. 197. Hepburn v. Auld, 5 Cranch, 262. Hatch v. Cobb, 4 Johns. Ch. Rep. 559. Kempshall v. Stone, 5 Johns. Ch. Rep. 193. Long v. Colston, 1 Hen. & Munf. 110. Perkins v. Wright, 3 Har. & M'Hen. 326. Colson v. Thompson, 2 Wheat. 336.

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as, for instance, in agreements for the purchase of stock, it being the same thing to the party, where or from whom the stock is purchased, provided he receives the money that will purchase it. But the sale of an annuity payable out of dividends of a particular  $\operatorname{stock}(a)$ , or of the right to a dividend upon a bankrupt's  $\operatorname{estate}(b)$ , or even a contract for stock where the object is to obtain delivery of certificates which confer the legal title to  $\operatorname{it}(c)$ , may be enforced in equity. These cases show what were the grounds on which courts of equity first interfered, but they have constantly held that the party who comes into equity for a specific performance, must come with perfect propriety of conduct, otherwise they will leave him to his remedy at  $\operatorname{law}(d)$ .

The decreeing a specific performance is a matter of discretion, but it is not an arbitrary, capricious discretion; it must be regulated upon grounds that will make it (\*)judicial(e)(129). And undoubtedly every agreement, of which there should be a specific execution, ought to be in writing, certain, and fair in all its parts, and for adequate consideration(f)(130).

- (a) Withy v. Cottle, 1 Sim. & Stu. 174, affirmed upon the hearing; 1 Turn. 78.
  - (b) Adderley v. Dixon, 1 Sim. & Stu. 607.
  - (c) Doloret v. Rothschild, 1 Sim. & Stu. 590.
- (d) Harnett v. Yielding, 2 Scho. & Lef. 553. [misprinted in the book] per Lord Redesdale; and see Cadman v. Horner, 18 Ves. jun. 10.
- (e) Per Lord Eldon, see 7 Ves. jun. 35; and see 1 Atk. 183; 4 Burr. 2539.
- (f) Per Lord Hardwicke, see 1 Ves. 279; and see 3 Atk. 386; Ellard v. Lord Llandlaff, 1 Ball & Beatty, 241; Martin v. Mitchell, 3 Swanst. 413; Stanley v. Robinson, 1 Russ. & Myl. 527.

<sup>(129)</sup> St. John v. Benedict, 6 Johns. Ch. Rep. 111. Seymour v. Delancy, 6 Johns. Ch. Rep. 222. Perkins v. Wright, 3 Har. & M'Hen. 326. Orr v. Hodgson, 4 Wheat. 465.

<sup>(130)</sup> See Colson v. Thompson, 2 Wheat. 336. Clitherall v. Ogilvie, 1 (\*203)

Equity will not decree a specific performance of an agreement made in a state of intoxication, although the party was not drawn in to drink by the plaintiff; nor will it decree the agreement to be delivered up; but will leave the parties to their remedy at law(g)(131).

If it be stipulated in a contract, that immediate possession shall be given to the purchaser, which is done, but in consequence of disputes as to the title, the seller afterwards turn the purchaser out of possession, he abandons his right to a specific performance (h).

A court of equity frequently decrees a specific performance where the action at law has been lost by the default of the very party seeking the specific performance, if it be notwithstanding conscientious that that agreement should be performed, as in cases where the terms of the agreement have not been strictly performed on the part of the person seeking specific performance; and to sustain an action at law, performance must be averred according to the very terms of the contract. Nothing but specific execution of the contract, so far as it can be executed, will do justice in such a case.(i).

Although damages may be recovered at law, yet equity (\*) is not therefore obliged to decree a specific performance;

- (g) Cragg v. Holme, 18 Ves. jun. 14, cited. See Say v. Barwick, 1 Ves. & Bea. 95.
  - (h) Knatchbull v. Grueber, 3 Mer. 124.
- (i) Davis v. Hone, 2 Scho. & Lef. 341,748. See Lennon v. Napper, ibid. 684.

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Des. 250, 257. Caldwell v. Myers, Hardin, 553. Carberry v. Tannehill, 1 Har. & Johns, 224. Seymour v. Delancy, 6 Johns. Ch. Rep. 222.

<sup>(131)</sup> See contra, Wigglesworth v. Steers, 1 Hen. & Munf. 70. As to the validity of contracts made by persons in a state of intoxication, see Rutherford v. Ruff, 4 Des. 350. Wade v. Colvert, 2 Rep. Con. Ct. 27. Campbell v. Ketcham, 1 Bibb. 406. Taylor v. Patrick, 1 Bibb. 168. White v. Cox, 3 Hayw. 82.

but the Court will judge on the whole circumstances of the case, whether it be such an agreement as ought to be carried into effect; for a jury, upon inquiry, may find very small damages, and then it would be very hard to carry such an agreement into execution in equity, when it would be greatly to the prejudice of the party against whom it should be decreed to be executed (k)(132).

In a case where a man was entitled to a small estate under his father's will, given on condition that if he should sell it in twenty-five years, half the purchase-money should go to his brother; he agreed, in writing, to sell it, and afterwards refused to carry the sale into execution, pretending to have been intoxicated at the time. A bill was brought against him to compel a specific performance; and Lord Hardwicke held, that without the other circumstance, the hardship alone of losing half the purchase-money, if carried into execution, was sufficient to determine the discretion of the Court not to interfere, but leave them to law(l)(133).

Nor will equity interpose, if the party who is called upon to do the act is not lawfully competent to do it; for that, amongst other inconveniences, would expose him to a new action for damages (m)(134).

- (k) Per Lord Hardwicke, MS. See Pope v. Harris, Lofft, 791, cited; White's case, 3 Swanst. 108, n.
- (1) Fain v. Brown, 2 Ves. 307, cited; Costigan v. Hastler, 2 Scho. & Lef. 160. See 2 Ball & Beatty, 283; Howell v. George, 1 Madd. 1.
- (m) Harnett v. Yielding, 2 Scho. & Lef. 554; Ellard v. Lord Llandaff, 1 Ball & Beatty, 241. See post, p. 210.

<sup>(132)</sup> See Perkins v. Wright, 2 Har. & M'Hen. 326. Clitherall v. Ogilvie, 1 Des. 263. Edwards v. Handley, Hardin, 602. See Campbell v. Spencer, 2 Binn. 129.

<sup>(133)</sup> See Rugge v. Ellis, 1 Des. 160, 163.

<sup>(134)</sup> A court of Equity will not enforce an agreement entered into in fraud of, or against the policy of the law. M'Dermed v. M'Castland, Hardin, 18. Hannay v. Eve, 3 Cranch, 242. It seems, that the alien-

But although a covenant ought not to be performed literally, yet equity will execute it according to a conscientious modification of it, to do justice as far as circumstances will permit(n)(135).

(\*)Suppressio veri, as well as suggestio falsi, is a ground to rescind an agreement, or at least not to carry it into execution(o), and even an industrious concealment, during a treaty, of the necessary repair of a wall to protect the estate from a river, which was a considerable outgoing, has been deemed a sufficient ground to withhold the aid of equity from a vendor(p). So where there is a mistake between the parties as to what was sold, the Court will not interfere in favor of either party(q). Even mere surprise on third persons at a sale by auction, has been deemed sufficient to prevent the Court from assisting a purchaser, as where the known agent of the seller bid for the estate on behalf of the purchaser, and other persons present thinking he was bidding as a puffer on the part of the vendor were deterred from bidding(r),

(n) Davis v. Hone, 2 Scho. & Lef. 348.

(o) See Buxton v. Cooper, 3 Atk. 383; S. C. MS.; Howard v. Hopkins, 2 Atk. 371; Young v. Clerk, Prec. Cha. 138; 1 Trea. Eq. ch. ii. s. 8; 1 Ball & Beatty, 241; Lord Clermont v. Tasburgh, 1 Jac. & Walk. 112.

(p) Shirley v. Stratton, 1 Bro. C. C. 410. See Small v. Attwood,

Younge's Rep.

(q) See 1 Ves. jun. 211; 6 Ves. jun. 339; 13 Ves. jun. 427; Higginson v. Clowes, 15 Ves. jun. 156; Clowes v. Higginson, 1 Ves. & Bea. 524; Harnett v. Yielding, 2 Scho. & Lef. 554.

(r) Twining v. Morris, 2 Bro. C. C. 326. See 6 Ves. jun. 338; 10 Ves. jun. 305, 313, 398; and see Willan v. Willan, 16 Ves. jun. 72; Magrave v. Archbold, 1 Dow, 107.

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age of the vendee may afford a sufficient reason for refusing a specific performance of a contract for the sale of lands, as against him. Hepburn v. Dunlop, 1 Wheat. 179.

<sup>(135)</sup> See Champion v. Brown, 6 Johns. Ch. Rep. 398. Ramsay v. Brailsford, 2 Des. 583.

So, in a recent case, where a purchaser, previously to the sale by auction, told the vendor that he would have nothing to do with the estate, but afterwards went to the sale, where he was considered by the company as a puffer(I) and bid 8,000l. for the estate, which was knocked down to him at that sum from the misapprehension of the person appointed to bid for the vendor, who ought to have (\*)bid 9,000l., and the mistake was instantly explained, a specific performance was refused(s)(136).

- (s) Mason v. Armitage, 13 Ves. jun. 25. See Hill v. Buckley, 17 Ves. jun. 394.
- (I) This is stated in the judgment, but qu. whether it appeared in evidence.

(136) No concealment or misrepresentation can have the effect of barring the rights of the parties to a contract, unless it be collusive or fraudulent, or the negligence be so gross as to amount to proof of fraud. Stuart v. Luddington, 1 Rand. 403. See further as to concealment and misrepresentation; M'Allister v. Barry, 2 Hayw. 290. Thigpen v. Balfour, 1 Car. Law Rep. 112. Kennedy v. Johnson, 2 Bibb, 12. In Bowman v. Bales, 2 Bibb, 47, 52, it was held by a majority of the court, that where the vendee of land, having discovered salt water, industriously and artfully concealed the fact from the vendor, equity would relieve against the contract of sale. See Armstrong v. Hickman, 6 Munf. 287.

In the case of Rothschild v. Brookman, 5 Blight. 165, where a holder of foreign stock buys and sells with the advice of his broker, and through him, but the broker in fact never purchases any stock, but being a holder of such stock himself the transactions are all nominal, and no transfers are made. After a loss on these transactions and a settlement of account, upon which the principal, who was ignorant that the transactions were nominal, pays a sum of money to the agent, upon a bill filed four years after the settlement, the transactions set aside, and the money paid ordered to be refunded, and the decree of the court of Chancery affirmed with costs.

"In sound policy no person ought, in any case, to be employed secretly to bid for the owner against the bona fide bidder, at a public auction. It is fraud in law on the very face of the transaction, and the owner's interference and right to bid, in order to be admissible, ought to be in-

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If an agent, employed to sell an estate, sells it in a manner not authorized by the authority given to him, a specific performance will not be decreed against the principal although the estate be sold for a greater price than he required for it(t). At least, it is clearly settled, that if an agent is empowered to sell an estate by public auction, a sale by private contract is not within his authority. For although the owner may have fixed the price, yet the estate might have sold for more at a public auction. But if an agent is directed to sell an estate by private contract, and he dispose of it by public auction for a larger sum than the principal required, it still seems open to contend that the purchaser may enforce a specific performance of the contract, unless some particular reason should occur to induce the Court to refuse its aid.

In Mortlock v. Buller(u), Lord Eldon said he should hesitate long before he should state as a clear proposition, that where the title to a specific performance is founded in a gross breach of trust by an agent to his principal, a court of equity would assist the plaintiff in the purpose of availing himself of that breach of trust; and whether the principle would not authorize the Court to leave him to law, and not to let him come for a remedy beyond that. There were, his Lordship added, dicta enough well to authorize that.

And where trustees for sale of an estate enter into a contract, which would be deemed a breach of trust,

<sup>(</sup>t) Daniel v. Adams, Ambl. 495; et vide a dictum by Lord Eldon in Coles v. Trecothick, 1 Smith's Rep. 247.

<sup>(</sup>u) 10 Ves. jun. 292; and see the close of the judgment, Ord v. Noel, 5 Madd. 438.

timated on the conditions of sale; and such a doctrine is understood to have been recently declared at Westminster Hall." 2 K. Com. 536.

In Mills v. Goodsell, 5 Conn. R. 475, the point decided was, that an officer who sells property on execution, cannot become a purchaser without the consent of both debtor and creditor.

(\*)equity will not only refuse to interfere in favor of the purchaser, but will even at the suit of the cestuis que trust restrain the trustees from executing the contract, and the purchaser will be left to his remedy at law(x).

If a person, entitled in default of execution of a power of sale, contract to sell the estate, not as owner, but merely as the agent of the trustees, and the contract could not, under the circumstances, have been carried into execution against the trustees, it will not be enforced against the agent, although he himself become entitled to the estate before the decree (y), (I).

Where a person takes upon himself to contract for the sale of an estate, and is not absolute owner of it, nor has it in his power by the ordinary course of law or equity to make himself so; though the owner offer to make the seller a title, yet equity will not force the buyer to take it, for every seller ought to be a bona fide contractor(z): and it would lead to infinite mischief if one man were permitted to speculate upon the sale of another's estate. Besides, the (\*)remedy is not mutual, which perhaps is of itself a suffi-

<sup>(</sup>x) Mortlock v. Buller, 10 Ves. jun. 292. See Hill v. Buckley, 17 Ves. jun. 394; Bridger v. Rice, 1 Jac. & Walk. 74.

<sup>(</sup>y) Mortlock v. Buller, 10 Ves. jun. 292.

<sup>(</sup>z) Tendring v. London, 2 Eq. Ca. Abr. 680, pl. 9. See 10 Ves. jun. 315; and 1 Jac. & Walk. 421; and query, whether there is any case, in which a man, knowing himself not to have any title, has been allowed to enforce the contract by procuring a title before the report.

<sup>(</sup>I) From the papers in this cause, it seems that Mr. Buller treated with Mr. Mortlock as the owner of the estate, and this appeared from the receipt for the purchase-money, where the estate was called, "the property of John Buller, Esq." and Mr. Mortlock had not any knowledge whatever that the estate was in settlement. See Lawrenson v. Butler, 1 Sch. & Lef. 13.

Since this note was written, an action brought by Mr. Mortlock against Mr. Buller, for breach of contract, came on for trial, when it was compromised on terms very advantageous to the plaintiff. See 2 Ball & Beatty, 60; and see 2 Dow, 518.

cient objection in a case of this nature. In Armiger v. Clarke(a), a tenant for life contracted to sell the inheritance: after his death, his son, who was entitled to the estate in remainder, and was not bound by his father's covenant, brought a bill for a specific performance against the purchaser, and it was dismissed chiefly upon this principle, that the remedy was not mutual(137). And in Noel v. Hoy(b), it was said, that if A. sells B.'s estate, although B. is willing to confirm the contract, A. cannot enforce it: there is no mutuality. So an infant cannot specifically enforce a contract by himself for sale, because there is no mutuality(c). But in Williams v. Carter(d), the estate was sold, and it was afterwards discovered that it was bound by marriage articles, which it was decided in a suit instituted for the purpose, authorized the introduction of a power of sale in the trustees, and thereupon a bill was filed by them and the seller for a specific performance. The Vice-Chancellor overruled the objection, that there was no mutuality in the agreement, and decreed a specific performance.

And on the other hand, where a bona fide vendor has not a title to the estate, the Court will not, in favor of the purchaser, decree an impossibility, but will leave the purchaser to his remedy at law upon the articles(e); and, although he must necessarily obtain a verdict, if he have recourse to law, yet he would in most cases obtain nominal damages only(f), for a purchaser, as a general rule, is

- (a) Bunb. 111; see post, ch. 6; Hamilton v. Grant, 3 Dow, 33.
- (b) V. C. 23 Feb. 1820, MS.
- (c) Flight v. Bolland, 4 Russ. 298.
- (d) MS. V. C. 1821.
- (e) Crop v. Norton, 2 Atk. 74; 9 Mod. 233; Cornwall v. Williams, Colles, P. C. 390; Benet College v. Carey, 3 Bro. C. C. 390.
- (f) Fleaureau v. Thornhill, 2 Blackst. 1078; and see 3 Bos. & Pull. 167. See Brig's case, Palm. 364. Vide post.

<sup>(137)</sup> See Parkhurst v. Van Cortlandt, 1 Johns. Ch. Rep. 273, 282. Benedict v. Lynch, 1 Johns. Ch. Rep. 370.

(\*)not entitled to any compensation for the fancied goodness of his bargain, which he may suppose he has lost(138).

But where the purchaser is willing to take the title, such as it is, it is apprehended that he may do so. In a late case(g)(139), Lord Redesdale said, that the plaintiff in equity must show that in seeking the performance, he does not call upon the other party to do an act which he is not lawfully competent to do; for, if he does, a consequence is produced that quite passes by the object of the Court in exercising the jurisdiction, which is to do more complete justice. If a party is compelled to do an act which he is not lawfully authorized to do, he is exposed to a new action for damages, at the suit of the person injured by such act; and, therefore, if a bill is filed for a specific performance of an agreement made by a man who appears to have a bad title, he is not compellable to execute it, unless the party seeking performance is willing to accept such a title as he can give, and that only in case where an injury would be sustained by the party plaintiff, in case he were not to get such an execution of the agreement as the defendant can give. His Lordship took the reason to be this, among others, not only that it is laying the foundation of an action at law, in which damages may be recovered against the party, but also that it is by possibility injuring a third person, by creating a title with which he may have to contend.

It is, however, the received opinion, that the purchaser may elect to take the title, such as it is, although no injury would be sustained by him in case the agreement

## (g) Harnett v. Yielding, 2 Scho. & Lef. 549. See post.

<sup>(138)</sup> See Hepburn v. Dunlop, 1 Wheat. 179. Hepburn v. Auld, 5 Cranch, 262. Butler v. O'Hear, 1 Des. 382. Fisher v. Kay, 2 Bibb, 434. Johnson v. Hobson, 1 Lit. 314. Kelley v. Bradford, 3 Bibb, 317. As to damages in case of eviction by title paramount, see Cooper's Justinian, 607 to 620, where the American cases on that subject are collected.

<sup>(139)</sup> See Roach v. Rutherford, 4 Des. 126.

were not executed, nor does the rule seem to lead to the difficulty which has been apprehended; for, in such a case, the covenants must, of course, be so framed, as not to leave the seller exposed to an action on account of the (\*)flaw in the title; but where the conveyance would be merely void, and might embarrass persons claiming under the same title as the seller, equity seems to refuse its aid on substantial grounds(h).

But where a tenant for life with a power of sale, first settling other estates of equal or better value, sold the estate under an apprehension that he had power to convey the fee, the Court refused to compel him to settle another estate, in order to enable him to complete his contract(i).

To enable the Court to decree a specific performance against a vendor, it is not, however, necessary that he should have the legal estate; for if he has an equitable title, a performance in specie will be  $\operatorname{decreed}(k)$ , and he must obtain the concurrence of the persons seised of the legal estate.

Although, as we have seen, a vendor cannot demand the aid of equity, unless he is a bona fide contractor, yet the circumstance that the purchaser is a nominal contractor, and purchases in trust for another person, is immaterial; for it happens, in a vast proportion of cases, that the contract is entered into in the name of a trustee(l), and the mere fact of a quarrel having taken place between the vendor and the real purchaser, totally unconnected with the subject of the contract(m), or even a bare

<sup>(</sup>h) See Ellard v. Lord Llandaff, 1 Ball & Beatty, 244. See O'Rourke v. Percival, 2 Ball & Beatty, 56.

<sup>(</sup>i) Howell v. George, 1 Madd. 1.

<sup>(</sup>k) Crop v. Norton, 2 Atk. 74. See Costigan v. Hastler, 2 Scho. & Lef. 160.

<sup>(</sup>l) Hall v. Warren, 9 Ves. jun. 605.

<sup>(</sup>m) S. C.

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refusal by the vendor to deal with the real contractor(n), is not a sufficient ground to refuse a performance in specie of the agreement.

But if a person apply to purchase an estate, and the (\*) vendor expressly refuse to treat with him, unless the money is paid down, which he is unable to do, but procures some other person to purchase the estate on his account, it seems clear, that at least the time appointed for payment of the money will be deemed of the very essence of the contract(o). So if a person apply to purchase an estate on behalf of A., for whom the vendor has a great value or affection, and the vendor is induced to take less for the estate than he otherwise would have done; or even, perhaps, without this circumstance, the agreement cannot be enforced against the vendor, if it be made on behalf of any other person than A.; but if A. will patronize the sale, execution of the agreement must be compelled, although he may sell the estate the next day to the fraudulent purchaser(p).

The case of Scott v. Langstaffe(q), was decided on the same principle. A purchaser of a house adjoining to a house occupied by the vendor, agreed with the vendor, though it was not made part of the written contract, that he would not lease the house to any person not agreeable to him. Langstaffe applied for a lease, and stated that he knew the vendor intimately, and that there

<sup>(</sup>n) Lord Irnham v. Child, 1 Bro. C. C. 92.

<sup>(</sup>o) Popham v. Eyre, Lofft, 786. Mr. Brown's note of this case evinces the danger of relying on short notes of cases; see 1 Bro. C. C. 95, n. See O'Herlihy v. Hedges, 1 Schoales & Lefroy's Rep. 123; but note, that case was between landlord and tenant; and see Featherstonhaugh v. Fenwick, 17 Ves. jun. 298.

<sup>(</sup>p) Philips v. Duke of Buckingham, 1 Vern. 227. In Mr. Raithby's edit. it is said that a specific performance was decreed. The principle, however, is now well established.

<sup>(</sup>q) Lofft, 797, 798, cited; and see Bonnett v. Sadler, 14 Ves. jun. 527; Fellowes v. Lord Gwydyr, 1 Sim. 63.

would be no objection to grant him a lease. The vendor, however, disapproved of Langstaffe, and, so far from knowing him intimately, had only seen him at a tavern. Lord Camden said, this was the case of Philips v. the (\*)Duke of Buckingham. Nobody, who had read that case, could easily forget it. And his Lordship set aside the agreement which Langstaffe had obtained, with costs.

A similar case is mentioned in Hawkins's life of Johnson, which was also decided on the authority of Philips's case. Peele the bookseller had a house near Garrick's at Hampton. Peele had often said, that as he knew it would be an accommodation to Garrick, he had given directions that at his decease he should have the refusal of it. On Peele's death, a man in the neighborhood applied to his executors, pretending that he had a commission from a friend or relation of Peele's, who lived in the country, to buy the house at any price, and he accordingly obtained a conveyance of it to a person nominated by him under a secret trust for himself. Garrick filed a bill against him, and the purchase was decreed fraudulent, and set aside with costs.

But although a seller falsely assume the character of an agent to another, when he is himself the real seller, and the purchaser be deceived by the representation, yet it has been decided that if the purchaser cannot prove damage, or that the misrepresentation induced him to enter into the contract, a specific performance will not be refused(r).

An agreement for the sale of an annuity for three lives, to be named by the purchaser, and to commence immediately, will be decreed, although the lives have not been named, if the delay has been occasioned by the seller(s).

<sup>(</sup>r) Fellowes v. Lord Gwydyr, 1 Sim. 63; 1 Russ. & Myl. 83.

<sup>(</sup>s) Pritchard v. Ovey, 1 Jac. & Walk. 396.

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In some cases(t), it has been holden, that where no (\*)action at law will lie to recover damages, equity will not execute the agreement in *specie*; for equity will never make that a good agreement, which is not so by law; but, in other cases(u), the contrary has been holden, and relief been given accordingly.

Perhaps the following distinctions are authorized by the cases, and will reconcile them.

First, That although the agreement be void at law, yet a specific performance will be decreed, if there is a clear ground for the interference of equity, according to the general rules of the Court; and, however unqualifiedly the contrary rule may have been laid down, there is not (that I am aware of) any case clearly entitled to the aid of the Court, to which this rule has been successfully opposed as a bar to the relief.

Thus a bond from a woman to her intended husband has been enforced in equity, although void at law by the intermarriage; and an agreement for sale of an estate has been decreed against an heir at law, although his ancestor died before the time appointed to convey the estate, and therefore no action would lie against him. In the first of these cases the impropriety of the security was deemed immaterial; for it was sufficient that the bond was a written evidence of the agreement of the parties, and the agreement being upon a valuable consideration, ought to be executed in equity. The decision in the other case depended upon the doctrine, that the

<sup>(</sup>t) The Marquis of Normanby v. Duke of Devonshiré, 2 Freem. 216; Dr. Betesworth v. Dean and Chapter of St. Paul's, Sel. Cha. Ca. 66; and see 2 Eq. Ca. Abr. 15, 23, notis; and Fonbl. n. (c) to 1 Trea. Eq. 138, and n. (h) to p. 204, ibid.

<sup>(</sup>u) Winged v. Lefebury, 2 Eq. Ca. Abr. 32, pl. 43; Acton v. Pierce,
2 Vern. 480; Cannel v. Buckle, 2 P. Wms. 243; Norton v. Mascall,
2 Vern. 24; and Hall v. Hardy, 3 P. Wms. 187. See East India
Company v. Donald, 9 Ves. jun. 275; 1 Smith's Rep. 213.

articles were a lien upon the land; the contract being a purchase in equity: But,

(\*) Secondly, Equity cannot contradict or overturn the grounds or principles of law(x)(140); and therefore, in many cases, it must be considered whether damages could be recovered at law, and the Court will be guided by the result(y).

Thus agreements for sale of an estate have (as we have already seen) been decreed on mere letters which have passed between the parties, but not unless all the terms of the agreement were therein specified; and even this was going a great way. In the first case, therefore, in which even a trifling omission appeared in the letters, it was natural to pause before the performance of the agreement was decreed, and to ascertain whether damages could be recovered at law: for the statute of frauds and perjuries must receive the same construction in a court of

- (x) See 2 P. Wms. 753; Earl of Bath v. Sherwin, 10 Mod. 1.
- (y) See Hollis v. Edwards, 1 Vern. 159.

(140) See Hollingsworth v. Fry, 4 Dall. 345, 347.

Tha tan opinion formerly prevailed, that on a suit for the specific execution of a parol agreement for the sale of land, the defendant must either confess or deny the agreement, and, that in the former case, the plea of the statute of frauds would be unavailing, is not less true than strange. But it is now the settled rule of the court, that although the defendant should answer and admit the agreement as stated in the bill, he may nevertheless protect himself against a performance, by pleading the statute. And it was held in Thompson v. Tod, 1 Pet. C. C. R. 380, that part performance of the contract can have no other effect than to let the plaintiff in to prove the contract aliunde, where it is not confessed; but in the case then before the court no such proof was given; the contract being neither admitted nor proved: held, that the plaintiff was not entitled to the relief which he specifically prayed for. Washington, J. added, that although it should be admitted, that under all the circumstances of that case, that the payment of a part of the purchase money will amount to a part peformance, still it should appear, beyond all reasonable doubt, that the payment was understood by the parties to have been so made and intended.

equity as in a court of law, unless in the case of fraud, &c. where equity interposes and relieves against the abuse, or allays the rigor of the law.

The case of the Marquis of Normanby v. the Duke of Devonshire, was, I believe, the first in which this point occurred; and, according to a manuscript note, it appears that Lord Somers called in the two chief justices on the point, whether the party, on the letters which had passed, could have recovered damages at law? They were of opinion that he could not, and Lord Somers accordingly dismissed the bill.

So there are very few cases in which a court of equity can decree a performance of an agreement upon which there can be no action at law, according to the words of the articles, and the events that have happened(z).

A provise, in a contract for sale, that if either party (\*)break the agreement he shall pay a sum of money to the other, will only be considered in the nature of a penalty(a); and consequently a specific performance will be decreed just as if no such provise had been inserted. The defendant will not be allowed to forfeit the penalty, and get rid of the agreement(b)(141).

Where an action is brought for the recovery of the penalty, to entitle the party bringing it to recover, he ought punctually, exactly, and literally, to have completed his part(c). And, it has been said, that if, for

- (z) Whitmel v. Farrel, 1 Ves. 256.
- (a) Howard v. Hopkins, 2 Atk. 371. See 2 Scho. & Lef. 684; and Margrave v. Archbold, 1 Dow, 107; Davies v. Penton, 6 Barn. & Cress. 216; 9 Dowl. & R. 369, S. C.
- (b) Hopson v. Trevor, 1 Str. 533; 2 P. Wms. 191; Parks v. Wilson, 10 Mod. 515.
  - (c) Duke of St. Alban's v. Shore, 1 H. Blackst. 270.

<sup>(141)</sup> See Telfair v. Telfair, 2 Des. 271. Telfair v. Telfair, ut supra.

breach of an agreement, to which a penalty was annexed, either party recover damages at law beyond the penalty, equity will relieve against the verdict, on payment of the penalty only(d); but this is not well founded, for, if the party have two remedies at law, one for breach of contract upon the covenant, or agreement, toties quoties; the other for the penalty at once(e), there appears to be no pretence for equity to relieve; although where large damages have been recovered at law, under a covenant which it was unconscientious strictly to enforce, the party may be relieved in equity, upon offering to perform the covenant according to conscience: but even this seems, in some measure, to be usurping the province of a jury, and the equity is administered with great caution (142).

Where the parties have expressly stipulated, that in case of a breach by either, he shall pay a sum named as *liquidated* (\*) damages, the whole sum may, if the agreement be broken, be recovered at law(f)(143).

If a power be given in a contract to a purchaser to leave the purchase-money as a charge upon the property for a given period at interest, and it be stipulated that the purchaser shall be deemed a tenant to the seller at a rent equal to the interest, and the seller have power to distrain; though the agreement be acted upon, yet the instrument would not be deemed a lease, but is substantially a contract for purchase, and the power of distress does not alter the nature of the contract between the par-

<sup>(</sup>d) Shenton v. Jordan, Bunb. 132; but the reporter adds a query, for this seems an extraordinary opinion.

<sup>(</sup>e) See Harrison v. Wright, 13 East, 343.

<sup>(</sup>f) Reilly v. Jones, 1 Bing. 302; 8 Moo. 244, S. C.

<sup>(142)</sup> See Skinner v. Dayton, 2 Johns. Ch. Rep. 526. Graham v. Bickham, 4 Dall. 149.

<sup>(143)</sup> See Slosson v. Beadle, 7 Johns. Rep. 72. Hasbrouck v. Tappen, 15 Johns. Rep. 200.

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ties. And this construction would be applied in the event of the bankruptcy of the purchaser(g).

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## SECTION III.

Of the Remedies for a Breach of Contract.

If either the vendor or vendee refuse to perform the contract, the other may bring an action for breach of contract, or file a bill for a specific performance (h); although it appears to have been formerly thought that as a vendor only wants the purchase-money, his remedy was at law(i).

Where one party fails in performing the contract, the other, if he means to rescind the contract, should give a clear notice of his intention (k).

If a bill be filed for a specific performance, the Court (\*)will enjoin either party not to do any act to the injury of the other. Therefore, if the purchaser is in possession, and has not paid the money, the Court will grant an injunction against his cutting timber (l)(144); so, on the other

- (g) Hope v. Booth, 1 Barn. & Adolp. 498.
- (h) Lewis v. Lord Lechmere, 10 Mod. 503.
- (i) See Armiger v. Clark, Bunb. 111; Withy v. Cottle, 1 Sim. & Stu. 174. See Kenney v. Wenham, 6 Madd. 315.
  - (k) Reynolds v. Nelson, 6 Madd. 18.
  - (1) Crockford v. Alexander, 15 Ves. jun. 138.

<sup>(144)</sup> An injunction to stay waste will not be granted against a vendee, to whom land has been sold in fee, even where the vendor retains the title as security for the purchase money; unless he brings his suit to enforce the lien, alleging, that the defendant is committing waste in such a manner as to render the land an incompetent security; in which case, an (\*217)

er hand, the vendor will be restrained from conveying away the legal estate in the property; because such a measure might put the purchaser to the expense of making another party to the suit(m); and, a fortiori, he will be restrained from selling the estate to a third person(n). But in Spiller v. Spiller(o), the Lord Chancellor expressly laid it down, that upon a bill filed for a specific performance, he wished it to be understood, that the Court would not take from a seller the disposition of his property. So injunctions may be granted against the agents of the parties. But an injunction will not be granted against a person who is not a party to the suit; and, in a late case, in which, upon a bill filed by a seller for a specific performance, and an injunction against the purchaser's proceeding at law to recover the deposit from the seller's attorney, to whom it was paid, Sir John Leach, V. C. refused the motion, with costs, because the attorney was not a party to the suit(p). But in a very recent case, the same Judge granted an injunction to restrain the purchaser from proceeding in an action against the auctioneer, although he (the auctioneer) was not a party to the suit; the seller offering to bring the deposit into Court.

In all cases where a bill in equity is filed for a specific

- (m) Echliff v. Baldwin, 1 Ves. jun. 267.
- (n) Curtis v. Marquis of Buckingham, 3 Ves. & Beam. 168.
- (o) 30 June 1819, MS. S. C. 3 Swanst. 556.
- (p) Brown v. Frost, E. T. 1818. MS.

injunction to stay waste, pending the suit, may be awarded. Scott v. Wharton, 2 Hen. & Munf. 25. An injunction will lie against a mortgagor in possession, to stay waste; although no suit be pending for foreclosure. Brady v. Waldron, 2 Johns. Ch. Rep. 148. So, an injunction will lie to restrain the defendant from cutting timber and committing other waste, he being in possession, claiming title adversely, a suit being pending, at law, to try the title. Shubrick v. Guerard, 2 Des. 616. See contra, Storm v. Mann, 4 Johns. Ch. Rep. 21.

performance, either party may in general, if he please, have a reference as to the title. The vendor is entitled to (\*)this privilege in order to enable him to make out a title before a Master. The purchaser is allowed this right, in order that he may have the title assured in a manner he otherwise could not. As to a purchaser, the Court never acts upon the fact, that a satisfactory abstract was delivered, unless the party has clearly bound himself to accept the title upon the abstract; but though the abstract is in the hands of the party who says he cannot object to it, yet he may insist upon a reference; because, by the production of papers, which can be enforced, and by the examinations and inquiries which can be made by virtue of the decree, the title may be examined in a manner it never could upon a mere abstract(q)(145). Either party may, however, wave this right.

Where a man makes a purchase of an estate, to which the vendor represents that he has a good title, in such a case the purchaser has a right to insist, that the question whether he have or have not a good title shall be sifted to the bottom before he can be called upon to adopt either alternative, and before the vendor can be let off from his original contract(r).

Where the purchaser files the bill, and insists that the vendor cannot make good a title, equity can only dismiss the bill with costs, although the Court will compel him to make out the title if he have the ability(s). But the Court has power in a suit so framed to decide whether the title is good or bad.

If, after the confirmation of a report in favor of a title,

- (q) See Lord Eldon's judgment in Jenkins v. Hiles, 6 Ves. jun. 653.
- (r) 3 Mer. 137, per Lord Eldon.
- (s) Nicloson v. Wordsworth, 2 Swanst. 365.

<sup>(145)</sup> See Beverley v. Lawson's heirs, 3 Munf. 317, 383. M'Comb v. Wright, 4 Johns. Ch. Rep. 659. (\*218)

a new fact appear, by which the title is affected, the title will be referred back to the Master(t). In a case where the seller of a leasehold estate produced the leasehold title. (\*) which the Master thought sufficient, and reported accordingly; but the Court held, that the lessor's title ought to have been produced, and sent it back to the Master to review his report; the seller had liberty given to him to produce the freehold title. And it was considered that the purchaser was at liberty to enter into objections to the leasehold title, which were not taken upon the former discussions before the Master(u). And, upon the objections being afterwards taken, the bill was dismissed (x). The course of the Court is, where the Master has, by expressing an opinion in favor of the title, prevented the vendor from showing, that if his opinion had been otherwise, still the title was good, to send it back to the Master to review his report, the party moving to pay the costs of the motion(y). If the Master's report in favor of the title be overruled, yet the seller may, upon an early application, obtain a reference back, in order to show that the title is valid upon another ground not before taken(z).

So where it appears at the hearing upon the exceptions, that the seller can clear up the objection, the Court has sometimes sent the title back to the Master to review his report, and in such a case it is not necessary, as it was held by Lord Eldon, that the Master should have liberty to receive further evidence. He may receive such evidence without any express authority. In the case of

<sup>(</sup>t) Jeudwine v. Alcock, 1 Mad. 597.

<sup>(</sup>u) Fildes v. Hooker, 2 Mer. 424. Andrew v. Andrew, 3 Sim. 390.

<sup>(</sup>x) S. C. V. C. 3d April 1818, MS; 3 Madd. 193.

<sup>(</sup>y) Egerton v. Jones, 3 Sim. 392.

<sup>(</sup>z) Egerton v. Jones, 1 Russ. & Myl. 694. Portman v. Mill, ib. 697.

<sup>(\*219)</sup> 

Esdaile v. Stephenson(a), it appeared that the estate was subject to a rent-charge, and a term to secure it; and (\*)the purchaser's counsel, before the Master, required the seller to produce a release of it, or evidence that the jointress would release; but although he did not do so, the Master reported, that the seller could make a good title upon the jointress releasing. To this report exceptions were taken. The Vice-Chancellor consulted the Lord Chancellor, and stated their opinion to be, that the report was wrong. It should have been, that the seller could not make a good title unless the jointress joined; and the Vice-Chancellor recommended in future, the form of such a report to be, that the seller could not make a good title, because A. is a jointress, and no sufficient evidence has been produced to show that she will release. The Lord Chancellor and the Vice-Chancellor agreed, that if a title upon a new fact can be made between the report and the further directions, the Court will enforce the contract, as if in the above case the jointress had agreed to join when the cause came on for further directions: In such a case the Court would expect counsel to appear, and consent that she would concur. This points out the necessity in such cases of setting down the cause upon further directions at the same time with the exceptions. In Esdaile v. Stephenson, as the exceptions only were before the Court, they were ordered to stand over, with liberty to set down the cause for further directions, and then the exceptions and further directions to come on together. It was in the above case expressly laid down, that the Court would not allow a seller to lie by before the Master, and then upon further directions attempt to make a title. There was an appeal from this decision, but it has since been withdrawn.

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<sup>(</sup>a) V. C. 8 Aug. 1822. MS. S. C. 6 Madd. 366: Paton v. Rogers, 6 Madd. 256.

If exceptions are taken to the report, that a good title can be made, and are overruled, other objections to the title cannot be made; but if exceptions are allowed, and (\*) a new abstract of title is delivered, further objections may of course be brought in(b).

In Noel v. Hoy(c), the seller rested his title on the construction of a will, by which he insisted the estate did not pass. The point was decided against him, and then he asked for a reference to the Master, to see whether he could make a good title, as he insisted that the devisees were trustees for him. This reference was objected to by the purchaser. The Court said, that it should have great difficulty in allowing the plaintiff after a decree to amend his bill, by bringing new parties before the Court. But time had been allowed to get an act of parliament. If the Master was of opinion that the devisees were trustees for the seller, he would report in favor of the title. If a suit should be necessary to try their equity, he would report against it.

A purchaser may file a bill for a specific performance, although it appears by the abstract that the vendor has no title, and yet unless he chooses to take the title, the Court cannot force it upon him, on the ground of his having filed the bill with a knowledge of the objection (d)(146).

Where objections are made by a purchaser, evidently with a view to gain time, the Court itself will enter into the consideration of the objections, without referring the title to a Master. So where a bill is filed by a purchaser, the vendor, the defendant, has been allowed, after answer, and before the hearing of the cause, to move, that an

<sup>(</sup>b) Brooke v.—, 4 Madd. 212.

<sup>(</sup>c) V. C. 23 Feb. 1820, MS.

<sup>(</sup>d) Stapylton v. Scott, 16 Ves. jun. 272.

<sup>(146)</sup> See Waters v. Travis, 9 Johns. Rep. 450. on appeal.

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inquiry may be directed as to the title, and at what time the abstract was delivered; and whether it was sufficient. This was allowed, in order to enable the Court to dispose (\*) of the cause with despatch(e). Again, where a vendor filed a bill for a specific performance, and the purchaser submitted to perform the contract if a good title could be made, asserting that upon the abstract a good title could not be made, it was, upon the motion of the plaintiff, referred to the Master to inquire whether a good title could be made, and whether it appeared upon the abstract that a good title could be made(f). Lord Eldon has observed, that some degree of irritation was excited in the Court by persons called land-jobbers, contracting for estates without any intention of paying for them, and setting up defects of title, merely with the view of gaining time, to dispose of them; and, on that ground, Lord Rosslyn was prevailed upon to direct a reference of the title immediately, on motion; and there is not much mischief in that upon a simple case of specific performance, where there is nothing more; but the relief may be so modified and qualified, with reference to the nature and object of the contract, that unless it is purely that point, great difficulty may arise(g).

In a later case, Lord Eldon directed a reference of the title, upon the bill of a vendor, before the answer was put in. The bill was a mere averment of the contract, putting no special fact in issue, and the Court considered the plaintiff as undertaking to do all such acts, for the purpose of executing what the Court thinks right, as if the answer was in, and the cause brought to a hearing. With that undertaking, if they cannot state any objection to the performance, and the reference is merely to look

<sup>(</sup>e) Moss v. Matthews, 3 Ves. jun. 279.

<sup>(</sup>f) Wright v. Bond, 11 Ves. jun. 39.

<sup>(</sup>g) 17 Ves. jun. 278.

into the title, his Lordship did not apprehend the answer to be necessary before that reference(h). But if the (\*)defendant's counsel state that there are other objections, the title cannot be referred(i).

And in every case where the answer, upon reasons solid or frivolous, insists, that the agreement ought not to be executed, the Court must first dispose of the question raised(k). Therefore, where the question simply was, whether the vendor of a leasehold estate was bound to produce the lessor's title, a motion by the purchaser for a reference to the Master upon the title was refused(l). So where the defendant, the purchaser, alleges laches on the part of the plaintiff, as a ground for his not being compelled to perform the agreement, the Court will decide the question raised, before the title is referred to the Master(m).

Until lately, it was not the general practice, to make an inquiry, ab ante, at what time the plaintiff could make a title(n). If, upon the usual reference to the Master, to inquire whether the seller could make a good title, he reported in the affirmative, it might, with a view to costs, have been referred back to the Master, to inquire whether a good title could have been made at the filing of the bill;

- (h) Balmanno v. Lumley, 1 Ves. & Beam. 224.
- (i) Matthews v. Dana, 3 Madd. 470.
- (k) Blyth v. Elmherst, 1 Ves. & Beam. 1; see Paton v. Rogers, ibid. 351; Biscoe v. Brett, 2 Ves. & Beam. 377; Fullagar v. Clark, 18 Ves. jun. 481; Morgan v. Shaw, 2 Mer. 138; Boehm v. Wood, 1 Jac. & Walk. 419; Withy v. Cottle, 1 Turn. 78; 1 Sim. & Stu. 174; Gordon v. Ball, 1 Sim. & Stu. 178.
- (l) Gompertz v. ——, 12 Ves. jun. 17. See Eldridge v. Porter, 14 Ves. jun. 139; and see 17 Ves. jun. 278.
- (m) See Blyth v. Elmherst, ubi sup. Skelton's case, 1 Ves. & Bea. 517; Wallinger v. Hilbert, 1 Mer. 104; Lowe v. Manners, 1 Mer. 19; Portman v. Mill, 2 Russ. 570.
- (n) Gibson v. Clarke, 2 Ves. & Bea. 103. See Jennings v. Hopton,
  1 Madd. 211; and see Lubin v. Lightbody, 8 Price, 606.
  (\*223)

and if not, when it was that a good title could be made(o); (\*) and this reference might be made as well after a decree, as after an interlocutory order. The Vice-Chancellor (Sir John Leach) considered, that great additional expense and delay were occasioned by parties not asking, in the first instance, where the circumstances of the case made it material, that if the Master should find that a good title could be made, then that he might inquire when such good title was first shown to the purchaser (p). In a later case of Harrington v. Secretan, where the purchaser moved for a second order, the learned Judge, under the circumstances, granted the motion; but made a general rule, with the approbation of the bar, which he has since regularly followed, that the first reference should be to see whether a good title can be made, and if so, at the request of either party, to inquire when the seller showed a title. This rule appears to be entirely free from objection.

When the title is referred to the Master upon motion, and the report is against the title, the defendant may move to dismiss the bill with costs, and the Court can make the order without setting down the cause(q).

Where the purchaser has been a long time in possession of the estate, and of the abstract, without objecting to the title, a specific performance will be decreed at once without a reference as to the title(r). But the question depends upon a conclusion of fact. The Court must be satisfied that the purchaser intended to wave, and has actually waved his right of examining the title, and of course the waver may itself be rebutted by the conduct of

<sup>(</sup>o) Daly v. Osborne, 1 Mer. 332; Birch v. Haynes, 2 Mer. 444.

<sup>(</sup>p) Hyde v. Wroughton, 3 Madd. 279. See Anon. 3 Madd. 495.

 <sup>(</sup>q) Walters v. Pyman, 19 Ves. 351; Whitcomb v. Foley, V. C.
 1821, MS.; S. C. 6 Madd. 3.

<sup>(</sup>r) Fleetwood v. Green, 15 Ves. jun. 594; Margravine of Anspach v. Noel, 1 Madd. 310.

(\*)the seller, e. g. in furnishing further documents to make out the title(s). This subject has already been discussed(t).

But even after it has been decided that the right to call for the title is waved, if for the purpose of settling the conveyance a deed is produced, which shows a bad title, a specific performance will not be decreed. This was decided in Warren v. Richardson(u). The Lord Chief Baron observed, that though the Court thought the defendant had by his conduct waved that right, it had come out collaterally, that the plaintiff could not make a title according to his contract. It would be a great hardship upon a party to force him to accept a title which was ascertained to be defective. It would be contrary to all the rules which prevail upon the subject of specific performance. The principles upon which courts of equity have proceeded on the subject of specific performance, do not make a decree for a specific performance the necessary consequence under all circumstances of an agreement. Circumstances of hardship often prevent it. They recollect that the party is not without remedy, for, though he should be refused a specific performance, he has left to him his action upon the agreement. created the difficulty in this case was, that the conduct of the party had barred his right to the usual investigation into the title, and this defect was a defect of title. If the objection had been to the conveyance merely, the defendant would have had the full benefit of it without any doubt. But the objection was of another description: it was an objection to the title: it stood decided upon the record, that the defendant had waved his right to call upon the plaintiff for the production of his title; on the other

<sup>(</sup>s) Burroughs v. Oakley, 3 Swanst. 159.

<sup>(</sup>t) Supra, p. 10.

<sup>(</sup>u) 1 You. 1.

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(\*)hand, it was clear that the plaintiff could make no good title, and if the defendant took it, it would be defective.

A new practice has sprung up, by which certainly some suits have been quickly disposed of, but which has been a great surprise upon many parties. I allude to the practice of ordering a purchaser in possession of the estate upon motion to pay the purchase-money into court. This, under special circumstances, has been done even before answer(x); but the purchaser has, in some cases, had the option to pay the money, or give up possession(y); in others, an occupation-rent has been set, deducting interest on the deposit(z); and, in others, a receiver has been appointed(a). And payment of the money will be ordered, although by the agreement it is payable by instalments, and a portion of it is to remain secured upon the estate(b).

This rule has been adopted where the possession has been given under a mutual apprehension that the title could be immediately made good(c)—where the purchaser had a sort of mixed possession with the vendor, and had paid part of the purchase-money, was insolvent, and had attempted without effect to sell the estate(d)—where the purchaser approved of the title and prepared a conveyance, and then raised objections(e)—where the purchaser

- (x) Dixon v. Astley, 1 Mer. 133. See Burroughs v. Oakley, 1 Mer. 52, 376; Blackburn v. Stace, 6 Madd. 69.
- (y) Clarke v. Wilson, 15 Ves. 317; Smith v. Lloyd, 1 Madd. 83; Morgan v. Shaw, 2 Mer. 138; Wickham v. Everest, 4 Madd. 53.
  - (z) Smith v. Jackson, 1 Madd. 618; Smith v. Lloyd, 1 Madd. 83.
- (a) Hall v. Jenkinson, 2 Ves. & Beam. 125. See Clarke v. Elliott, 1 Madd. 606.
  - (b) Younge v. Duncombe, 1 You. 275.
  - (c) Gibson v. Clarke, 1 Ves. & Beam. 500. See 1 Madd. 607.
  - (d) Hall v. Jenkinson, 2 Ves. & Beam. 125.
- (e) Watson v. Upton, Coop. 92, n. But see Bonner v. Johnston, 1 Mer. 366; and See Crutchley v. Jerningham, 2 Mer. 502; Fournier v. Edwards, T. T. 1819, V. C. The deeds were executed, and an ap-

(\*)had been guilty of laches, and cut underwood(f). Even in a case where it appeared on the face of the abstract that the title was bad, but the purchaser had sold and conveyed the estate to another purchaser(g). So where from circumstances an acceptance of the title was inferred(h)—again, where a time was fixed for payment of the purchase-money by instalments, and the property was a coal-mine(i). In all these cases the rule has been applied, and if the estate be sold under a decree, the purchaser, if he enters into possession, will be compelled to pay his purchase-money into court, unless he entered with the express consent of the Court(k).

But where the sale is not by the Court, and the seller has thought proper to put the purchaser into possession, with an understanding between them that he shall not pay his money until he has a title, the purchaser cannot be called upon to pay the money into court in this summary way(l), nor can the payment be compelled where the vendor gives possession without stipulation(m), or the purchaser was in possession under another title before the contract(n); or the possession was given independently of the contract, and the seller has been guilty of laches(o), although in such cases the purchaser

plication was made for the completion of the purchase, but the purchaser had not the money. The motion was made upon the answer, by which the defendant claimed compensation for some charges.

- (f) Burroughs v. Oakley, 1 Mer. 52, 376 ; Dixon v. Astley, 1 Mer. 133, 378, n. ; Bradshaw v. Bradshaw, 2 Mer. 492.
  - (g) Brown v. Kelty, L. I. Hall, July 1816, MS.
- (h) Boothby v. Walker, 1 Madd. 197; and see Smith v. Lloyd, 1 Madd. 83.
  - (i) Buck v. Lodge, 18 Ves. jun. 450.
  - (k) Anon. L. I. Hall, 16 July 1816, MS.
  - (1) Gibson v. Clarke, 1 Ves. & Beam. 500.
  - (m) Clarke v. Elliot, 1 Madd. 606.
  - (n) Freebody v. Perry, Coop. 91; Bonner v. Johnston, 1 Mer. 366.
  - (o) Fox v. Birch, 1 Mer. 105.

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(\*)may make himself liable to the demand, by dealing improperly with the estate, e. g. cutting trees, or selling it to another person(p).

Perhaps two simple rules may be deduced from the cases: 1st. Where the possession is taken under the contract, or is consistent with it, and the purchaser has not dealt improperly with the estate, the cause must take its regular course.

But 2d, If the possession by the purchaser, without payment of the money, is contrary to the intention of the parties, or is held according to it, but the purchaser has exercised improper acts of ownership, for example, cutting timber, by which the property is lessened in value, or selling the estate, by which the first seller's remedy is complicated without his assent; in such cases, the Court will interpose and compel the purchaser to pay the purchase-money into court.

Where the sum is large, the Court has allowed a long day, for instance, three months for payment of the money(q); and under proper circumstances, the time will be enlarged(r).

Where a vendor files a bill for an injunction and a specific performance, the Court will, upon granting the injunction, put him upon proper terms, and therefore will in most cases order him to pay the deposit into court. But where the seller at the time of the bill filed is able and willing to make a good title to the estate sold, and the purchaser improperly refuses to complete the contract, (\*)although the seller is in possession of the estate, he will not be compelled to pay the deposit into court, be-

<sup>(</sup>p) Cutler v. Simons, 2 Mer. 103; Bramby v. Teal, 3 Madd. 219; Gill v. Watson, *ibid.* 225.

<sup>(</sup>q) Townshend v. Townshend, L. I. Hall, March 3, 1817, Master of the Rolls for the Lord Chancellor. MS.

<sup>(</sup>r) Brown v. Kelty, Michaelmas Term, 1816, MS., the Vice-Chancellor for the Lord Chancellor; Townshend v. Townshend.

cause it is the fault of the purchaser and not of the seller that the latter retains both the deposit and the estate(s).

Although the defendant, by his answer, put in issue an objection to the title, and both parties examine witnesses to the point before the hearing, yet, upon a reference to the Master, both sides may produce further evidence before him(t).

If the seller has vested in him legally, or equitably, all the interest in the estate, it cannot be objected to the Master's report in favor of the title that the legal estate is outstanding, although in a lunatic, against whom no commission has issued(I). The vendor has the power, provided he will take the means necessary for the purpose of making a good title. If he neglect this, the question will properly arise when the Master comes to settle the conveyance(u).

Where an estate is sold in lots to different persons, the vendor cannot include them in one bill, for each party's case is distinct, and must depend upon its own peculiar circumstances, and there must be a distinct bill upon each contract(x). In demurring to a bill against distinct purchasers, as multifarious, the defendants need not deny combination(y), although that was formerly deemed essential(z).

If the purchaser's defence to a bill for a specific performance (\*)rest merely on the want of title in the vendor, he ought to depend on his answer, and not to file a cross-bill to have the agreement delivered up; because

- (s) Wynne v. Griffith, 1 Sim. & Stu. 147.
- (t) Vancouver v. Bliss, 11 Ves. jun. 458.
- (u) Berkeley v. Dauh, 16 Ves. jun. 380.
- (x) Rayner v. Julian, 2 Dick. 677; Brookes v. Lord Whitworth, 1 Madd. 86.
  - (y) Brookes v. Whitworth, 1 Madd. 86.
  - (z) Bull v. Allen, Bunb. 69.

<sup>(</sup>I) This is not now a serious difficulty.

the vendor can make no use of the contract if he have no title (a). And a purchaser should not make the stewards or receivers of the vendor parties to his bill for a specific performance; for although, as we have already seen, the vendor is deemed a trustee for the purchaser, yet this rule does not extend to the agents of the vendor (b).

Where the plaintiff, in a bill for a specific performance, cannot prove his agreement, as laid; but the defendant, who proves the agreement to be different, offers to perform specifically the agreement which he represents; the Court will execute the agreement as proved by the answer, without a cross-bill, although the plaintiff should wish to have the bill dismissed(c), if the Court think the defendant entitled to a specific performance(d)(147).

But, if a plaintiff insist upon a particular construction of a contract, and the Court decides against him, he will not be allowed a specific performance according to the construction against which he has contended. It is not like the case of a plaintiff calling upon the Court to construe and execute an agreement according to the true construction; suggesting that which he conceives to be so(e).

If a bill for a specific performance be dismissed, it would require a clear and distinct case to be made out and prayed, to entitle the plaintiff to an account of rents, or the like(f).

(\*) If a purchaser have recourse to equity, and it appear that the vendor has, since the filing of the bill, sold the

- (a) Hilton v. Barrow, 1 Ves. jun. 284.
- (b) Macnamara v. Williams, 6 Ves. jun. 148.
- (c) Fife v. Clayton, 13 Ves. jun. 546.
- (d) Higginson v. Clowes, 15 Ves. jun. 516.
- (e) Clowes v. Higginson, 1 Ves. & Beam. 524.
- (f) Williams v. Shaw, 3 Russ. 178, and Stevens v. Guppy, 3 Russ. 171.

estate to another person, the Court will, it has been determined, refer it to a Master to inquire what damage the purchaser has sustained; and the sum which shall be found due, together with costs, will be directed to be paid to  $\lim(g)(143)$ . Equity, however, cannot give the purchaser any compensation where he files a bill to have the contract delivered up on account of the defective title of the vendor. But he will obtain a decree for delivering up of the contract, without prejudice to his remedy at law for breach of  $\operatorname{it}(h)(149)$ .

In a recent case, upon a specific performance, where Lord Eldon refused to direct an issue or an inquiry before the Master, with a view to damages, his Lordship said, that the plaintiff must take that remedy, if he chooses it, at law. In Denton v. Stewart, the defendant had it in his power to perform the agreement, and put it out of

<sup>(</sup>g) Denton v. Stewart, 1 Cox. 258; 1 Ves. jun. 329; 17 Ves. jun. 276, cited; Reg. Lib. A. 1785, fol. 552, 717; supra, p. 116, n.; Greenway v. Adams, 12 Ves. jun. 395.

<sup>(</sup>h) Gwillim v. Stone, 14 Ves. jun. 128.

<sup>(148)</sup> As to the principles by which a court of equity will be governed in retaining a bill for a compensation in damages, in cases where the agreement cannot be specifically decreed, see *Hatch* v. *Cobb*, 4 Johns. Ch. Rep. 559. *Kempshall* v. *Stone*, 5 Johns. Ch. Rep. 193. *Phillips* v. *Thompson*, 1 Johns. Ch. Rep. 131. *Hepburn* v. *Auld*, 5 Cranch, 262, 275. *Sims'* Admr. v. *Lewis*, 5 Munf. 29.

In Fulweiler v. Baugher, 15 S. & R. 45, where the action was on bonds, being part of the consideration of land sold; and it being agreed that the title was defective for a part, which was to be cured by a title to be given by the plaintiff, held, that in the event of the plaintiff's inability to give a title, the court will grant a new trial. "It is like the case where part is recovered from the vendee by adverse title; in which case the price of that part, in proportion to the residue, is to be deducted from the bond, before any interest is calculated on the bond. But to this there may be an exception, if the vendee has enjoyed the land during the time interest is demanded; and this is a matter of evidence for the jury."

<sup>(149)</sup> See Sims' Admr. v. Lewis, ut supra.

his power pending the suit. The case, if it was not to be supported upon that distinction, was not according to the principles of the Court(i).

In a late case(k), where a seller had, after a contract for sale, sold at an advance to another person, the bill filed by the first purchaser prayed, that if the second purchaser bought without notice, the seller might account to the plaintiff for the advanced price. It was not necessary to decide the point; but Lord Eldon observed, that the estate by the first contract, becoming the property of the vendee, the effect was, that the vendor was seized as a (\*)trustee for him; and the question then would be, whether the vendor should be permitted to sell for his own advantage the estate of which he was so seised in trust, or should not be considered as selling it for the benefit of that person for whom, by the first agreement, he became trestee, and therefore liable to account. The ultimate decision was, that the first purchaser was entitled to a specific performance against the seller and the second purchaser, the latter being considered to take subject to the equity of the first purchaser, to have a conveyance of the estate at the price which he agreed to pay for it (l).

But where the contract has been executed, a bill cannot be filed simply for compensation,  $e.\ g.$  where the rental of the estate was represented higher than its actual amount(m).

It may here be observed, that if an exception taken to a report that a good title connot be made, be overruled, the vendor should obtain an order for the exception to

<sup>(</sup>i) Todd v. Gee, 17 Ves. jun. 273; Blore v. Sutton, 3 Mer. 237, Kendall v. Beckett, 2 Russ & Myl. 88.

<sup>(</sup>k) Daniels v. Davison, 16 Ves. jun. 249.

<sup>(</sup>l) 17 Ves. jun. 433.

<sup>(</sup>m) Newham v. May, 10 Price, 117.

stand over; as, if disallowed, it would appear upon record that a good title could not be made(n).

If the abstract be not delivered in time, or objections arise to the title, the vendee may bring an action at law for non-performance of the agreement, in which case the vendor's remedy (if he can insist on the contract being specifically performed) is to file a bill for a specific performance, and an injunction to restrain the proceedings at law; and the vendor may file his bill for a performance in specie, although the vendee may have recovered his deposit at law. If an injunction be granted, the Court will not dissolve it without the Master's report as to the (\*)title, where the action is brought on the ground of want of title(o).

If a purchaser, upon a bill being filed for a specific performance, pay the purchase-money without putting in an answer, and afterwards discover that a fraud was committed in the sale, he is not precluded from bringing an action for damages if he come recently after discovery of

the deception (p).

But if a defendant in a suit for a specific performance, after a decree, bring an action at law against the plaintiff in equity for damages, and the decree proceeded upon the ground that he had waved the literal performance of the thing, for breach of which the action is brought,  $e.\ g.$  the time appointed for performance of the contract, Equity will enjoin the action(q).

Where the purchaser has paid any part of the purchasemoney, and the seller does not complete his engagement, so that the contract is totally unexecuted, he, the purchaser, may affirm the agreement, by bringing an action

<sup>(</sup>n) See 1 Ves. jun. 567.

<sup>(</sup>o) Church v. Legeyt, 1 Pr. 301.

<sup>(</sup>p) Jeudwine v. Slade, 2 Esp. Ca. 257.

<sup>(</sup>q) Reynolds v. Nelson, 6 Mad. 290. (\*233)

for the non-performance of it, or he may elect to disaffirm the agreement *ab initio*, and may bring an action for money had and received to his use(r)(150).

In this latter action, however, the plaintiff cannot recover more than the money paid, although the estate has risen in value; while, on the other hand, it may perhaps be thought, that if the estate has experienced a diminution in value, he can only recover the damages he sustained by the estate not being conveyed, that being the only money retained by the defendant against conscience; (\*) and therefore the plaintiff, ex æquo et bono, ought not to recover any more(s)(151).

The right to disaffirm the agreement is, in some cases, of great importance. If an agent enter into an agreement on behalf of his principal, but on the face of the agreement the agent appear to be the real purchaser, and is so considered by the vendor, yet if the purchaser actually pay the deposit, although through the medium of his agent, and the vendor do not complete his engage-

<sup>(</sup>r) See 2 Burr. 1011; Farrer v. Nightingale, 2 Esp. Ca. 639; Ifunt v. Silk, 5 East, 449; Squire v. Tod, 1 Camp. N. P. 293. See Levy v. Haw, 1 Taunt. 65.

<sup>(</sup>s) See Moses v. M'Farlan, 2 Burr. 1005; Dutch v. Warren, ib. 1010, cited; and Str. 406; S. C. Dale v. Sollet, 4 Burr. 2133, sed. qu

<sup>(150)</sup> See Weaver v. Bentley, 1 Caines' Rep. 47. Gillet v. Maynard, 5 Johns. Rep. 85, and see S. C. note a. p. 88, where the principal authorities are collected. So, a vendor, by bringing a suit and obtaining judgment for the purchase money, confirms the sale, so that he cannot, afterwards, set it aside. Nelson v. Carrington, 4 Munf. 332.

<sup>. (151)</sup> If there be no fraud, and no covenants taken to secure the title, the purchaser of real estate has no remedy for the purchase-money on a failure of title. Abbot v. Allen, 2 Johns. Ch. Rep. 519. See Dorsey v. Jackman, 1 Serg. & Rawle, 42. Howes v. Barker, 3 Johns. Rep. 506. Note, the authority of Moses v. M'Ferlans, referred to in the text, has been much questioned. See O'Harra v. Hall, 4 Dall. 340, 341.; and see 1 Serg. and Rawle, 51.

ment, so that the contract is rescindable, the purchaser himself may maintain an action for recovery of the deposit, which will be considered as money received by the vendor to the use of the real purchaser(t).

But if a man enter into a contract expressly as agent for a third person, although really for his own benefit, and the other party has no notice that the supposed agent is the principal, the latter cannot maintain an action upon the contract without first disclosing to the other party that he is the principal (u).

Where a purchaser rests his action on a defect in the title, it is not sufficient to show that the title has been deemed insufficient by conveyancers, but he must prove the title bad(x).

If he succeed in proving the title bad, he will, according to the counts upon which he recovers, obtain a verdict either for his deposit, or for damages, which in most cases would be regulated by the amount of the deposit.

If he declare on the common money-counts, he of course (\*)cannot obtain any damages for the loss of his bargain; and even if he affirm the agreement by bringing an action for non-performance of it, he will obtain nominal damages only for the loss of his bargain(y), because a purchaser is not entitled to any compensation for the fancied goodness of his bargain which he may suppose he has lost, where the vendor is, without fraud, incapable of making a title(152).

- (t) Duke of Norfolk v. Worthy, 1 Camp. Ca. 337. See Edden v. Read, 3 Campb. Ca. 338; Bethune v. Farebrother, 5 Mau. & Selw. 385, 391, cited.
  - (u) Bickerton v. Burrell, 5 Mau. & Sel. 383.
  - (x) Camfield v. Gilbert, 4 Esp. Ca. 221.
- (y) Flureau v. Thornhill, 2 Blaks. 1078; and see 3 Bos. & Pull.167. See Brig's case, Palm. 364.

<sup>(152)</sup> Where land is sold with warranty, and the purchaser is evicted, the measure of damages, unless fraud has been practised, is the price (\*235)

And in a late case(z), where an auctioneer who had advanced some money on an estate, sold it by auction after the authority from his principal had expired, and the principal refused to confirm the sale, the Court of Common Pleas, in an action brought by the purchaser, in which he declared on the agreement, and for money had and received, &c. would not allow him damages for the loss of his bargain, although it was proved that the estate was worth nearly twice the sum which he gave for it.

But in a recent case(a), where a person who had contracted for the purchase of an estate, but had not obtained a conveyance of it, sold it by auction with a stipulation to make a good title by a day named, but which he was unable to do, as the vendor to him refused to convey, it was held, that the purchaser by auction might, beyond his expenses, recover damages for the loss which he sustained by not having the contract carried into effect. Lord Tenterden observed, that upon the present occasion he could only say, that if it is advanced as a general proposition, that where a vendor cannot make a good title, the purchaser shall recover nothing more than nominal damages, he was by no means prepared to assent to it. If it were necessary to decide the point, he should desire (\*)to

<sup>(</sup>z) Bratt v. Ellis, MS. Appendix, No. 7; and see Jones v. Dyke, MS. Appendix, No. 8.

<sup>(</sup>a) Hopkins v. Grazebrook, 6 Barn. & Cress. 31; 9 Dowl. & R. 22, S. C.

agreed to be paid by the purchaser. In cases of fraud, the jury are not limited to the price, but may award in damages the amount of the injury sustained by the loss of the land. King v. Pyle, 8 S. & R. 166. If notice is duly given of the suit, and the warrantor does not defend, the record of the recovery is conclusive against him, in an action of covenant on the warranty. If the vendee defends without giving notice, he cannot recover his expenses, unless in a case of fraud or the absence of the warrantor. Fulweiler v. Baugher et al. 15 ib. 45.

have time for consideration. But the circumstances of this case showed that it differed very materially from that which had been quoted from Sir W. Blackstone's Reports. There the vendor was the owner of the estate, and an objection having been made to the title, he offered to convey the estate with such title as he had, or to return the purchase-money with interest; here no such offer was or could be made. The defendant had unfortunately put the estate up to auction before he got a conveyance. He should not have taken such a step without ascertaining that he would be in a situation to offer some title, and having entered into a contract to sell, without the power to confer even the shadow of a title, he must be responsible for the damage sustained by a breach of his contract. Mr. Justice Bayley said, that the case of Flureau v. Thornhill was very different from this, for here the vendor had nothing but an equitable title. Now where a vendor holds out an estate as his own, the purchaser may presume that he has had a satisfactory title, and if he holds out as his own that which is not so, he may very fairly be compelled to pay the loss which the purchaser sustains by not having that for which he contracted.

This case is one of great importance, and will, I fear, tend to much litigation before the distinction which it in-

troduces is thoroughly understood.

In the later case of Walker v. Moore(b), where after the contract the abstract was delivered and showed a good title, but it had not been examined with the deeds; the purchaser resold the estate at a profit, and then upon an examination of the deeds it appeared that the title was defective, and he had to pay to the second purchasers the costs of investigating the title; it was held that the original purchaser could not recover from the original (\*)seller the costs of the resale or the costs paid to the

<sup>(</sup>b) 10 Barn. & Cres. 416.

second purchasers, or any damages for the loss of the bargain. The case of Hopkins v. Grazebrook was said to be very different from this. There the defendant had sold property as his own which was not so, and the Court was of opinion that the defendant being in fault, by representing himself as the owner of the property, the plaintiff's right was not restrained to nominal damages. Here the defendants undertook to make a good title, and they might honestly think they should be enabled to do so. The right to damages generally was held to be concluded by Flureau and Thornhill. And as to the expenses upon the resale, as there was no fraud, negligence in preparing the abstract was the only thing that could be imputed to the sellers, and the purchaser by exercising ordinary care might have averted the loss that had arisen from that negligence. It is usual and reasonable, before any expense is incurred, to examine the abstract with the deeds, and the purchaser ought not to recover expenses which he had sustained by reason of his having contracted to resell the premises before he had taken the trouble to ascertain whether the abstract was correct or not.

But one of the Judges expressed his opinion, that if the abstract had been examined with the deeds and found correct, the purchaser might perhaps have been justified in acting on the faith of having the estate, and if after that time he had made a sub-contract, the learned Judge thought he would have been entitled to recover the expenses attending it, if it failed in consequence of any defect in the title of his vendor. And further, if there were mala fides in the original vendor (but not otherwise), he was not prepared to say that the purchaser might not recover the profits which would have arisen from the resale.

In a case of this nature a purchaser is not entitled to any compensation, although he may be a loser by having (\*)sold out of the funds, which may have arisen in the mean time, because he had a chance of gaining as well as losing by a fluctuation of the price(c).

But a purchaser is entitled to interest on his deposit(d); and if the residue of the purchase-money has been lying ready without interest being made by it, he is entitled to interest on that(e). Where the plaintiff recovers under a special count on the original contract, which, we have seen, affirms the agreement, interest will be given as part of the damages for non-performance of the agreement: where he recovers under a count for money had and received, which disaffirms the contract, and to which is mostly added a count for interest, it may, it should seem, be recovered as damages sustained by the plaintiff, by reason of the money having been withheld from him. If, however, the original contract is void, as, if it be a parol agreement for the sale of lands, the purchaser can only recover his deposit in an action for money had and received, and will not be allowed interest(f)(153).

Where the plaintiff declares on the original contract, and lays the expenses incurred in investigating the title, &c. as special damages, he will be entitled to recover them as such(g). In one case Lord Ellenborough threw out a doubt upon this(h); but in a subsequent case before his Lordship, in which Gibbs, C. J., then at the bar, was counsel for the vendor, the defendant, a purchaser, ob-

(d) See ch. 10, infra.

(e) Flureau v. Thornhill, ubi sup.

(h) Camfield v. Gilbert, 4 Esp. Ca. 221.

<sup>(</sup>c) Flureau v. Thornhill, 2 Blackst. 1078.

<sup>(</sup>f) Walker v. Constable, 1 Bos. & Pull. 306. In this case, however, the rule was laid down generally, that interest could not be recovered in an action for money had an received; and see Tappenden v. Randall, 2 Boss. & Pull. 472, sed qu.; and see ch. 10, infra.

<sup>(</sup>g) Flureau v. Thornhill, ubi sup.; Richards v. Barton, 1 Esp. Ca. 268; Bratt v. Ellis; Jones v. Dyke, App. Nos. 7 & 8.

<sup>(153)</sup> See Pease v. Barber, 3 Caines' Rep. 366, 367.

tained a verdict for his deposit with interest, and the (\*) expenses of investigating the title, without argument, it being admitted that the title was defective (i): in a still later case, they were also recovered by a purchaser (k); and there are other cases not reported, in which I am told such expenses have been recovered. If the rule were otherwise, it would induce many persons upon speculation to offer an estate for sale, knowing the title to be bad; and yet, in a late case at nisi prius, Mansfield, C. J. held, that the purchaser was not entitled to recover back the expenses of investigating the title (l).

But clearly the expenses cannot be recovered under a count for money had and received; and Lord Ellenborough has decided that they cannot be recovered under a count for money paid, &c. to the defendant's use, as the money is expended for the purchaser's own satisfaction as to the title which he is about to take(m)(154). Nor can the expenses of investigating the title he recovered from the auctioneer(n). The expense of preparing the conveyances can hardly in any case be recovered,

<sup>(</sup>i) Turner v. Beaurain, Sitt. Guildh. cor. Lord Ellenborough, C. J., 2d June 1806. MS.

<sup>(</sup>k) Kirtland v. Pounsett, 2 Taunt. 145. See p. 146.

<sup>(1)</sup> Wilde v. Fort, 4 Taunt. 334. Note, the C. J. also ruled, that interest on the deposit is not recoverable, which is contrary to other authorities; and too large a construction, according to other authorities, appears to have been put on the statute of Elizabeth.

<sup>(</sup>m) Camfield v. Gilbert, 4 Esp. Ca. 221.

<sup>(</sup>n) Lee v. Munn, 1 Holt, 569.

<sup>(154)</sup> In covenant brought by the grantee against the grantor, for breach of the covenant against incumbrances in a deed, the plaintiff is entitled to recover, not only the purchase money, and the interest, but also the costs of the ejectment against him. Waldo v. Long, 7 Johns. Rep. 173. See Staats v. Ten Eyck's Exrs. 3 Caines' Rep. 111. Pitcher v. Livingston, 4 Johns. Rep. 1. Marston v. Hobbs, 2 Mass. Rep. 433, 440.

for they should not be prepared before the title is accepted (o).

Where a vendee brings an action on account of the agreement not having been completed, he will be compelled to give the vendor a particular of every matter of fact which he means to rely upon at the trial, as having been a cause of his not being able to complete the purchase; but he is not bound to state in his particular any (\*)of the objections in point of law arising upon the abstract(p).

But where no particular has been obtained, the plaintiff is not confined to the objections which he may have stated to the defendant, but may take advantage of any other, which may entitle him to recover as for breach of the agreement(q).

To entitle a vendor to sustain an action for breach of contract, it has been said, that he must show what title he has; it not being sufficient to plead that he has been always ready and willing, and frequently offered to make a title to the estate(r). In a late case(s), however, where a vendor averred, that he was seised in fee, and made a good and satisfactory title to the purchaser of the estate, by the time specified in the conditions of sale, it was held sufficient, and that it was not necessary for him to show how he deduced his title to the fee. And the Court seemed of opinion, in opposition to the prior cases, that a vendor need not display his whole title on the record. This decision, without working an injustice, will

<sup>(</sup>o) Jarmain v. Egelstone, 5 Carr. & Pay. 172.

<sup>(</sup>p) Collet v. Thomson, 3 Bos. & Pull. 246.

<sup>(</sup>q) Squire v. Tod, 1 Camp. Cas. 293.

<sup>(</sup>r) Philips v. Fielding, 2 H. Blackst. 123; and see Duke of St. Alban's v. Shore, 1 H. Black. 270; Luxton v. Robinson, Dougl. 620.

<sup>(</sup>s) Martin v. Smith, 6 East, 555; 2 Smith, 543; and see Co. Litt. 303, b; Terry v. Williams, 1 Moore, 498.

<sup>(\*240)</sup> 

in most cases render it unnecessary to load the pleadings with the title of the vendor.

But even if the title is set out, yet the execution of the title-deeds need not be proved, because that is never required of a vendor(t). This was decided by Lord Kenyon at nisi prius. To prove the plaintiff's title to a right of way sold, the deeds were produced; and it was objected, that the deeds themselves should first be made evidence, by producing the subscribing witnesses. (\*)But Lord Kenyon ruled it not to be necessary. He said, he would never allow, where the question was respecting a title, that the party should be called upon to prove the execution of all the deeds deducing a long title; that it was never mentioned in the abstract, or expected in making out a title in any case of a purchase, more particularly where possession has accompanied them: he therefore admitted them without proof of the execution (u). In a late case, however, before Lord C. J. Mansfield, at nisi prius, where in assumpsit upon an agreement to purchase a leasehold house, it appeared that the plaintiff, the vendor, was the third or fourth assignee of the term; and it was contended, that he need only prove the execution of the last assignment: it was ruled otherwise; and he was compelled to prove the lease and all the mesne assignments(x). Lord Kenyon's decision was not however adverted to; and as that clearly coincides with the practice in these cases, it can scarcely be considered as overruled(I).

If the agreement is in the hands of one of the parties, or his attorney, equity, in case a bill is filed, will compel

<sup>(</sup>t) Thomson v. Miles, 1 Esp. Ca. 184.

<sup>(</sup>u) Thomson v. Miles, ubi sup.

<sup>(</sup>x) Crosby v. Percy, 1 Camp. Ca. 303.

<sup>(</sup>I) The vendor's counsel cited Nash v. Turner, 1 Esp. Ca. 217; but Mansfield, C. J. thought that it did not apply.

it to be delivered up to the other party, in order that it may be stamped(y). So, in case of an action, if only one part of the agreement has been executed, the party, in whose possession it is, shall be compelled to produce it to the other party(z). And if there are even two parts, but one only is stamped, the party having the unstamped part may give secondary evidence of the contents of the (\*)agreement, if the other, after notice, refuse to produce the stamped part(a). Where one party produces the agreement, under a notice from the other, the latter need not call the subscribing witness to prove the execution of the agreement, as the defendant takes an interest under it(b)(155).

Where a contract is not completed merely on account of objections to the title, and the vendor thinks his title good, he frequently brings an action at law for non-

(y) Supra, p. 87.

(z) Blakey v. Porter, 1 Taunt. 386; Bateman v. Philips, 4 Taunt. 157; King v. King, ib. 666; Street v. Brown, 1 Marsh. 610.

(a) Garnons v. Swift, 1 Taunt. 507. See Waller v. Horsfall, 1 Camp. Ca. 501.

(b) Bradshaw v. Bennett, 5 Carr. & Pay. 48.

(155) Where a subscribing witness is dead or abroad, in an action on the instrument it is necessary to give some evidence of the identity of the party executing with the party sued, the naked proof of the handwriting of the subscribing witness is insufficient. If the attestation state the residence of the party, proof that the party sued resided there, would, as it seems, be prima facie evidence. Whitelocke v. Musgrove, 1 C. & M. 511; 3 Tyr. 541, S. C. This case may be considered as overruling the decisions of Lord Tenterden and Best, Ch. Js. in Mitchell v. Johnson, M. & M. 176; Page v. Mann, ib. 79; Kay v. Brookman, id. 286; and as settling a question which had long been a subject of doubt at N. P.

In an action by the vendee against the vendor of an estate, to recover the deposit money on a contract for the purchase, if the defendant on notice produce the contract, the plaintiff need not prove the contract. Bradshaw v. Bennett, 1 Moo. & M. 143; 5 C. & P. 48, S. C. (\*242)

performance of the agreement, instead of filing a bill for a specific performance.

It becomes therefore material to consider, whether courts of law can take cognizance of equitable objections to a title; because, if they cannot, a purchaser should in such cases file a bill in equity: he might otherwise be compelled to pay damages for not accepting a title, which, although good at law, might be invalid in equity.

The action which a vendor must bring, being founded upon the equitable circumstances of the case between the parties, it seems that a court of law may in such action take cognizance of equitable objections to a title; and if there were any, ought not to permit the plaintiff to recover.

In a recent case(c), the Court of B. R. would not permit the assignees of a bankrupt to recover money from his trustees, because the deed by which the trusts were created, although perhaps void at law, would probably be restored and set up again by a court of equity. The Court, I am informed, said they would not permit the (\*)assignees to recover, as it would be to no purpose. It would be merely driving the trustees to the other side of the hall, where they would most likely regain the property. This case seems in point; the same observation would apply to a vendor endeavoring to obtain the purchasemoney where there were equitable objections to his title: the court would naturally say, cui bono, when the purchaser can compel you to repay it in equity?(156).

## (c) Shaw v. Jakeman, 4 East, 201.

<sup>(156)</sup> That the mere cancelling a deed under which one holds real estate, will not divest the title or revest it in the grantor, is abundantly settled. Hatch v. Hatch, 9 Mass. 311; Dando v. Tremper, 2 Johns. 87; Lewis v. Payn, 8 Cowen, 75; Botsford v. Morehouse, 4 Conn. 550; Gilbert v. Bulkley, 5 ib. 262; Holbrook v. Tirrell, 9 Pick. 105. But if the grantee delivers back his deed with a view to a conveyance vol. 1.

Lord Kenyon held, that a court of law could not enter into equitable objections to a title where the purchaser is plaintiff(d); but Lord Alvanley(e) decided, that if a purchaser would be liable in equity, he is entitled to recover his deposit at law. The last case is certainly a very strong authority, because no Judge sitting in a court of law could be more averse than Lord Alvanley was to assume any equitable jurisdiction (f). His decision has been followed in a recent case, which appeared to have set the point at rest(g). Lord C. J. Gibbs said, that the question was, whether the contract were merely for a good title, or for a legal and equitable title. Now the words of the condition were, that a good title should be made out at the vendor's expense. What can the meaning of that be, except that there shall be a good title both at law and in equity? The vendor, therefore, not having made out a good equitable title, the contract on the part of the defendant is broken. It is true that we are in a court

- (d) Allpass v. Watkins, 8 Term Rep. 516.
- (e) Elliott v. Edwards, 3 Bos. & Pull. 181.
- (f) See Johnson v. Johnson, 3 Bos. & Pull. 162.
- (g) Maberly v. Robins, 1 Marsh. 258; 5 Taunt. 625; Curling v. Shuttleworth, 6 Bing. 121; 3 Moo. & P. 368, S. C. In Willett v. Clarke, 10 Price, 207, the Judges did not agree in opinion upon this point.

to a purchaser, who receives a deed, without fraud, he will hold the land against a creditor of the original grantee. It is no fraud upon creditors, for he received an equivalent for his land. But where the object of cancelling the deed and obtaining a new one from the grantee being to defeat an attachment by a creditor if the first grantee, the conveyance will be fraudulent. Holbrook v. Tirrell, 9 Pick. 105; Marshall v. Fisk, 6 Mass. 32. Parsons C. J. says "it was a vested estate in S. & F. and could not be divested by cancelling the deed from A., F. therefore he continued seized of his moiety, when it was taken on the execution of W. against him; because the second conveyance being fraudulent, is void as to the attaching creditors and because the cancelling of A.'s first deed did not divest F. of his moiety conveyed by it."

of law, but we are on the question whether the contract have been complied with. According to the defendant's (\*)doctrine, if an estate be devised to A. B. and [in trust] for C. it might be sold by A. and B. only, since they could give a legal title to it without the concurrence of C. And, if this principle were to be followed up, the defendant might bring an action for the remainder of the purchase-money. The rest of the Court concurred with this opinion, Mr. Justice Chambre observing, that there was no reason why questions respecting equitable title should not come incidentally before a court of law. Yet in Boyman v. Gutch(h), the Court of C. P. held that they must decide upon the construction of the trust deed under which the estate was sold, and abide by their construction; that they were not to consider themselves as a court of equity where the seller is seeking to enforce the purchase, in which case the Court frequently refuses the aid of its authority to enforce a specific performance where the title is of an unmarketable or even doubtful description, leaving the party to his action at law for damages, but they were called upon to answer the simple question upon the record, whether on the construction of a deed, the seller had or had not a legal title to convey to a purchaser. It appeared to them that the seller had the right to put up the property to sell, and to sell the same. Whether a court of equity would compel a purchaser to accept such a title was a question they were not called upon to determine. All that they professed to determine was the legal construction of the deed.

Before quitting this subject, it must be remarked, that in agreements for purchase, the covenants are construed according to the intent of the parties; and they are therefore always considered dependent, where a contrary inten-

<sup>(</sup>h) 7 Bing. 379; 5 Moo. & P. 222, S. C.

tion (\*)does not appear(i), (I). The true rule, Lord C. J. Mansfield, in a late case(k), said, was, that it is not the employment of any particular word which determines a condition to be precedent, but the manifest intention of the parties (157).

The old law was certainly in favor of the contrary doctrine(l); but if, as Lord Kenyon observed, the Courts were to hold otherwise than they now do, the greatest injustice might be done; for supposing, in the instance of a trader who had entered into a contract for the sale of an estate, that between the making of the contract and the final execution of it he were to become a bankrupt, the vendee might be in the situation of having had payment enforced from him, and yet be disabled from procuring the property for which he had paid(m).

- (i) As to where covenants are precedent, and where dependent, see Mr. Serjeant Williams's note(4) to 1 Saund. 525.
- (k) Smith v. Woodhouse, 2 New Rep. 233. See Havelock v. Geddes, 10 East, 555.
  - (l) 8 Term Rep. 370, 371.
  - (m) See Duke of St. Alban's v. Shore, 1 H. Black. 270; Goodis-

<sup>(</sup>I) In Morris r. Knight, T. 2 Jac. II. B. R. there were mutual covenants: one agreed to pay a sum of money for a lease for years; the other covenanted that he should enter in twenty days, and that he would make a demise thereof, from &c. and the plaintiff brought an action for non-payment of the money before the demise made, held not good for the lease is the consideration: so judgment for the defendant. MS.

<sup>(157)</sup> See Quackenboss v. Lansing, 6 Johns. Rep. 49. Barruso v. Madan, 2 Johns. Rep. 145, 148.; and see the opinion of the court in Cunningham and Morrell, 10 Johns. Rep. 204. As to dependent and independent covenants, see Obermyer v. Nichols, 6 Binn. 159. Bennet v. Pixley, 7 Johns. Rep. 249. See further, M.Millan v. Vanderlip, 12 Johns. Rep. 165. Jennings v. Camp, 13 Johns. Rep. 94. Green v. Reynolds, 2 Johns. Rep. 207. Jones v. Gardner, 10 Johns. Rep. 266. Gasley v. Price, 16 Johns. Rep. 267. Hardin v. Kretsinger, 17 Johns. Rep. 293. Robb v. Montgomery, 20 Johns. Rep. 15.

If, therefore, either a vendor or vendee wish to compel the other to observe a contract, he immediately makes his part of the agreement precedent; for he cannot proceed against the other without an actual performance of the agreement on his part, or a tender and refusal(158).

son v. Nunn, 4 Term Rep. 761; Glazebrook v. Woodrow, 8 Term Rep. 366; and Heard v. Wadham, 1 East, 619; and see Amcourt v. Elever, 2 Kel. B. R. 159; Carpenter v. Cresswell, 4 Bingh. 409; 1 Moo. & P. 66, S. C.

(158) Ramsay v. Brailsford, 2 Des. 582. Green v. Reynolds, ut supra. Porter v. Rose, 12 Johns. Rep. 209.

According to our practice, which is different from the English, the party who is to give the deed has the same drawn at his own expense; but, under a covenant to convey, he is not bound to prepare the conveyance until the party who is to receive it is in a situation rightfully to demand. And after such demand the grantor is allowed a reasonable time for drawing and executing it; and he is then to hold it ready for delivery when called for and is in no default until a second demand is made. The purchaser nevertheless may prepare the deed and tender it for execution—and then only one demand is necessary.

The above appears to be the settled law in this state: Fuller r. Hubbard, 6 Cowen, 1; Connelly v. Pierce, 7 Wend. 129; Per V. Chan. in Wells v. Smith, 2 Edw. C. R. 78. The case cited from Edwards was thus; Smith covenanted to convey to Wells the land in dispute, free of incumbrance; and Wells covenanted to build a shop before a specified day; also a dwelling-house, or instead of it pay \$1000; and to execute a bond and mortgage of the house and lot of land. But if he did not pay the 1000 dollars, then the mortgage was to be made for \$3700. The day was specified for Smith to execute her deed. "But upon this express condition and the agreement between the parties is such that if the said Wells fails or neglects to perform all or any one of the covenants herein before contained on his part, at the time or times herein before limited, then and in such case, all and singular the covenants and agreements on the part of the said Smith shall cease and be absolutely void, and all the right, title and intererst of the said Wells in law or equity in the premises shall also cease, and thereupon the said Smith, her heirs and assigns may immediately enter upon the premises and have and hold the same, with the shop, free and discharged from any claims of the said Wells." Wells failed to perform his covenants as to erecting the house and securing the purchase-money. But the parties subseThus a vendor cannot bring an action for the purchasemoney, (\*)without having executed the conveyance, or

quently came to an understanding that if Wells would pay Smith the whole of the purchase-money on the day stipulated, the latter would then give the former a deed; but she at the same time said to the former that if he permitted that day to pass, she should insist on the condition in the agreement. Wells failed in paying the money at the day; but on the next day he tendered the money and demanded his deed, she refusing to give a deed Wells sues his bill for a specific performance. The V. Chan, considering the agreement a condition precedent, dismissed the bill. The grounds of this decision are stated by our author p. 444, that time was the essence of the contract.—" Where as in the present case, the vendor requires and the vendee agrees to make it a condition of the contract and they insert the same as a distinct and substantive part of the agreement, namely, that a failure or neglect of the purchaser to perform all or any one of his covenants at the time specified (including the payment of the purchase-money on a future day) shall absolutely determine the contract, and the rights of the purchaser shall cease at law and in equity, and the vendor be at liberty to re-enter and hold the property discharged from all claim by the purchaser, it appears impossible to regard it as an unmeaning provision. Nothing can be stronger than the clause in question. It is a naked case of a condition unperformed within time. The distinction is between a condition precedent and subsequent; and the present is clearly a condition precedent, without any vested right or title. A man enters into a contract or makes a deed of settlement or a will; and he agrees to grant or devise an estate upon a condition which he declares must be performed before the person to be benefited can take it. But in cases of conditions subsequent it is different: the effect of a breach is to work a forfeiture or divest an estate, the court can interpose upon the principle of compensation to the party and prevent the forfeiture. It was urged that the contract was in effect a mortgage; but no legal title or estate ever vested in the complainant; the contract being merely an agreement to convey upon a condition.

In the case of Lausenbury v. The Protection Ins. Co. 8 Conn. R. 459, where a policy of insurance provided that if the building should be used for the purpose of storing hazardous goods, &c. the policy should cease and have no effect, held, that this was not a condition precedent; but must be averred in pleading by way of defence. "I give to the town of Stoughton, my lot of land in said town, containing eight acres, &c. for the purpose of building a school house, as said town may direct; provided it is built within 100 rods of the meetinghouse—remain-

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offered to do so, unless the purchaser has discharged him from so doing(n); but if the purchaser give a bill of exchange, or other security, for the purchase-money, payable at a certain day, he must pay it when due, and cannot resist the payment even in the case of a bill of exchange, on the ground that there was no consideration for the drawing of the bill, because the seller has refused to convey the estate according to the agreement. But he will have his remedy upon the agreement for the non-execution of the conveyance (o).

On the other hand, a purchaser cannot maintain an ac-

- (n) Jones v. Barkley, Dougl. 684; Philips v. Fielding, 2 H. Black. 123; and see 3 East, 443.
- (o) See Moggridge v. Jones, 14 East, 486; 3 Camp. Ca. 38; and see Swan v. Cox, 1 Marsh. 176; Spiller v. Westlake, 2 Barn. & Adolp. 155.

der to the demandants. Although they accepted the donation, they neglected building the house. The Court decided that this was upon a condition subsequent and that the estate vested immediately; but that the town had forfeited the estate by neglecting to comply with the condition in a reasonable time. (Hayden v. Stoughton, 5 Pick. 528. 10 ib. 309.) And acceptance of perfermance after the time has expired by the terms of the contract is prima facie evidence of a continuance of the contract in its original terms; but this is open to explanation. Merrill v. Emery, 10 Pick. 607. But where an indenture and the estate created by it were to be void and cease; and the right to the landlord to re-enter upon failure to perform the condition in respect to the payment of the rent, The Court Savage C. J., decided that the plaintiff could not sustain his action for the non-payment of rent without showing a demand made of the rent, on the day it fell due, at a convenient time before sun-down. He could not recover under the statute. because there was property on the premises, which might have been distrained. 3 Wend. R. 230.

An instrument which in form imports to be an absolute conveyance, may be determined to be a mortgage, whilst another importing on its face to be a mortgage may be determined to be a conditional sale, according to the intention of the parties, as evinced by testimony aliunde.

tion for breach of contract, without having tendered a conveyance, and the purchase-money (p).

This last position has, however, been rendered doubtful by some recent dicta of the Judges(q), that it is incumbent on the vendor to prepare and tender a conveyance, which, as a general rule, certainly seems to have prevailed when the simplicity of the common law reigned, and possession was the best evidence of title; but upon modifications of estates being introduced, which were unknown to the common law, and which brought with them all the difficulties which surround modern titles, it became necessary to make an abstract of the numerous instruments relating to the title, for the purpose of submitting it to the purchaser's counsel: and it then became usual for him to prepare the conveyance. This practice (\*) has continued, and is now the settled rule of the profession: the rule is, indeed, sometimes departed from, but this seldom happens, except in the country, and it always arises from consent, or express stipulation (159).

(p) See I Esp. Ca. 191; ex parte Hylliard, 1 Atk. 147.
(q) Lord Rosslyn, in Pincke v. Curteis, 4 Bro. C. C. 332; Macdonald, C. B. in Growsock v. Smith, 3 Anstr. 877; Lord Kenyon, in Heard v. Wadham, 1 East, 627; and Lord Eldon, in Seton v. Slade, 7 Ves. jun. 278.

<sup>(159)</sup> The law in Pennsylvania is different. In Sweitzer v. Hummel, 3 S. & R. 228, where the vendor covenanted, that upon payment of the purchase money he would give a title to the purchaser; held, that he was bound to prepare and tender the deed of conveyance: 'it is evident,' said the Chief Justice, 'that what may be a very convenient practice in England, may be very inconvenient here.' But, if the purchaser deny having made the purchase, without other objection, this was held, to dispense with a tender of the deed; for it would be a nugatory act for the vendor to tender a deed, which the purchaser told him he would not accept. Hampton v. Speckenagle, 9 ib. 212.

In Hudson v. Swift, 20 Johns. 27, it was settled, that to put the vendor in default, and entitle the vendee to recover so much of the purchase money as he had paid in advance, he must tender the residue and (\*247)

In a late case(r), this point came distinctly before the Court of Exchequer, and it was, in conformity to the pre-

(r) Baxter v. Lewis, 1 Forrest's Rep. Exch. 61; and see Martin v. Smith, 2 Smith, 543; but see Standley v. Hemmington, 6 Taunt. 561; 2 Marsh. 276, S. C.

demand a conveyance. And in the subsequent case of Fuller v. Hubbard et al. 6 Cowen, 1, where defendants agreed in writing to sell a lot of land to the plaintiff for the consideration of \$600; the sum of \$100 was paid at the time: And the residue was to be paid in three instalments, when a conveyance was to be made in fee, it was held, that the vendee was not entitled to maintain an action on the agreement, with money counts, although he had paid the whole of the purchase money: it being incumbent on him to show that he had demanded a conveyance, and after waiting a reasonable time, he had offered also to receive it.

So, on the other hand, where the consideration money, though payable by instalments, was all due before the vendor sued his action of covenant on the contract; and the breach assigned was the non-payment of the whole consideration money, held, that the plaintiff was bound to declare precisely as though the action had been brought for the last instalment, viz.-must aver a tender of the deed by the plaintiff. The Court, Sutherland, J. said, "The defendant covenanted to pay the plaintiff for the land in three equal annual payments; 'and upon the payment thereof, (the covenant proceeds) I am to receive a good warrantee deed of said land.' The payment of the money of the last instalment, and the giving of the deed, were to be concurrent acts. It is well settled that covenants like these are dependent, and that neither party can recover against the other without averring a tender of performance on his part; a mere readiness to perform is not sufficient. If the vendor sues for the consideration money, he must aver a tender of such as by the terms of his contract, he was to give. If the action is brought by the vendee against the vendor for not conveying, he must aver a tender of the consideration money before suit brought. Johnson v. Wygant, 11 Wend. R. 48; S. P. Green v. Reynolds, 2 Johns. 207; Jones v. Gardner, 10 ib. 266, and in Parker v. Parmele, 20 ib. 130. In the case last cited, it was held, that the vendor could not recover upon an averment that he was at the day ready and willing to convey, but he must allege an absolute tender or offer to convey.

The cases of Northrup v. Northrup, 6 Cowen, 296, and Slocum v. Despard, 8 Wend., 615, 18, acknowledge the same general doctrine; but the covenants were held to be independent, from the circumstance that the money was to be paid to a third person, and not to the vendor;

sent practice of the Profession, decided, that the purchaser, and not the vendor, is bound to prepare and tender the

and that the vendee was of course bound to produce evidence of the payment having been made before the vendor was bound to convey. There, a general averment of readiness on the part of the vendor was held sufficient; because the circumstance mentioned indicated the understanding of the parties that the payment was to be first made.

In the case of Brown v. Bellows, 4 Pick. 179, where the plaintiff sued in covenant broken upon an indenture wherein the plaintiff agreed to convey all his right, title, interest, &c. in a certain mill, &c. at the price which should be awarded by certain arbitrators; and the defendant agreed to pay for the same, on delivery of the deed; to the performance of which a penalty was annexed; held, that if the plaintiff conveyed by metes and bounds, and made a tender of the deed, it was sufficient, although the deed did not pursue the words of the agreement. The deed was sufficient to pass the property in the grantor's possession, with all his right and title to the same, just as if the words had been inserted. The case, said Putnam J. is like Martin v. Smith, 6 East, 555 in principle. The tendering of the deed was a performance, so far as concerned the plaintiff; and "it is a rule common to all conditions of obligations, that they be taken to be accomplished, when the debtor, who is obliged under such condition, has prevented its accomplishment." 1 Evan's Pothier, 121.

In Hunt v. Livermore, 5 Pick. 395, the plaintiff gave the defendant a bond for a deed of certain land; and the defendant on the same day made his promissory note to the plaintiff for the consideration money, for which the plaintiff acknowledged by receipt, which recited, "but provided the bargain is not carried into effect, I am to deliver up said note upon said Livermore's delivering said bond." The Court held, that the plaintiff was not entitled to an action on the note without showing an offer on his part to give a good deed of the land; the bond, note and receipt being parts of the same contract.

So, in Dana v. King, 2 ib. 155, where the defendant agreed in writing to buy of the plaintiff within a certain time a certain number of shares in the U. S. Bank, and the plaintiff agreed to sell: the price to be paid when the shares should be transferred: held, that the plaintiff could not maintain an action for the money, without averring and proving that he had offered to do what belonged to him to perform. And a clause in the agreement providing as to payment of the purchase-money, "which payment and transfer are to be made at any time after one month and within one year as aforesaid, at the option and request of the defendant or his assigns, he or they giving the plaintiff one week's notice to do

conveyance. In the early case of Webb v. Bettel(s), the same rule was expressly recognized by Windham, J. and denied by no one. He said, "that where a person is to execute a conveyance generally, there the counsel of the purchaser is intended to draw it, and then the purchaser ought to tender it.

It is settled, that if a conveyance is to be prepared at the expense of a purchaser, he is bound to tender it(t). Now it is admitted on all hands, that the expense of the conveyance must be borne by the purchaser, if there be no express stipulation to the contrary. Therefore, where there is no such stipulation, the purchaser is bound to tender the conveyance.

Upon the whole, notwithstanding the recent dicta to the contrary, as the precise point came before the Court of Exchequer, in Baxter v. Lewis, and their decision accords with the uniform practice of conveyancers, which has always met with the greatest attention in courts of justice(u), we may be warranted in saying, that the purchaser, and not the vendor, ought to prepare and tender the conveyance.

- (s) 1 Lev. 44.
- (t) Seward v. Willock, 5 East, 198.
- (u) See 2 Atk. 208; 1 Term. Rep. 772; Wilmot, 218.

the same," did not vary the case. "If the defendant did not request the transfer till within a week before the expiration of the year, the plaintiff should then, or perhaps any time before the year expired, have offered to transfer the stock. Not having done that both parties have suffered the contract to die." The case of Collins v. Gibbs, is decisive upon this point.

But where a party has performed his contract in part, and has been prevented by inevitable accident from fulfilling, he is entitled to compensation for the part performed, on an implied promise. 4 Pick. 101.

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If the purchaser is required by the agreement to prepare (\*)the conveyance, it is clear that the vendor may maintain an action, or file a bill, without tendering a conveyance(x); and therefore, to prevent all doubt on this point, it seems advisable to stipulate in the agreement or conditions of sale, that the conveyance shall be prepared by, and at the expense of, the purchaser. A purchaser must, however, prepare the conveyance, although it is merely declared that the conveyance shall be at his expense(y).

But although a purchaser is expressly required to prepare a conveyance, yet if a bad title be produced, he may maintain an action for recovery of his deposit, without tendering a conveyance(z). So where a vendor has, by selling the estate, incapacitated himself from executing a conveyance to the first purchaser, that renders further expense and trouble on his part unnecessary; and he may accordingly sustain an action without tendering a conveyance, or the purchase-money(a):

Although a seller's bill for a specific performance be dismissed, yet he may, in general, still bring his action at law for breach of the agreement; and there are instances of sellers recovering damages in such cases. Where the Court refuses its interference, and yet thinks that the seller is entitled to enforce his contract at law, it is usual to add a declaration to the decree, dismissing the bill, that it is without prejudice to the plaintiff's remedy at law. Where such a declaration is not added, equity will restrain the seller from bringing an action in a proper

<sup>(</sup>x) Hawkins v. Kemp, 3 East, 410.

<sup>(</sup>y) Seward v. Willock, 5 East, 198.

<sup>(</sup>z) Seward v. Willock, ubi sup.; S. P. ruled by Lord Ellenborough,
C. J. in Lowndes v. Bray, Sitt. after T. T. 1810.

<sup>(</sup>a) Knight v. Crockford, 1 Esp. Ca. 184. See Duke of St. Alban's v. Shore, 1 H. Black. 270.

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case; for example, where the bill was dismissed because the seller had no title (b).

(\*) Where a purchaser is let into possession on a treaty for purchase, he does not become tenant to the seller; and if the seller cannot make a title, it is doubtful whether an action will, under any circumstances, lie against the purchaser. It is settled that the action will not lie where the occupation has not been beneficial to him(c), beyond the mere protection from the inclemency of the weather, and if he paid the money, of which the seller might have made interest, although the jury expressly find that the value of the house, during the occupation of the purchaser, exceeds the interest of the money paid, yet the seller cannot recover(d); for it is impossible to make the rules of law depend on the balance of loss or gain in each transaction: one party must take back his money, and the other take back his house. A contract cannot arise by implication of law, under circumstances, the occurrence of which neither of the parties ever had in their contemplation.

But as the possession is in these cases lawful, being with the assent of the seller, an ejectment will not lie against the purchaser without a demand of possession, and refusal to quit(e); unless upon possession being given to him, he agreed to quit possession if he should not pay the purchase-money on a given day, or the like; in which case an ejectment will lie, without notice, on non-performance of his agreement. The agreement operates in

<sup>(</sup>b) M'Namara v. Arthur, 2 Ball & Beat. 349.

<sup>(</sup>c) Hearne v. Tomlin, Peake's Ca. 192.

<sup>(</sup>d) Kirtland v. Pounsett, 2 Taunt. 45.

<sup>(</sup>e) Doe v. Jackson, 1 Barn. & Cress. 448; Right v. Beard, 13 East, 210. See Hegan v. Johnson, 2 Taunt. 148; Doe v. Lawder, 1 Stark. 308; Doe v. Boulton, 1 Mood. & Malk. 148; Doe v. Waller, 1 Carr. & Payn. 595.

the same manner as a clause of re-entry on breach of covenant in a lease (f)(160).

(f) Doe v. Sayer, 3 Camp. Ca. 8. The same doctrine is extended to an agreement for a lease, Doe v. Smith, 6 East, 530; Doe v. Breach, 6 Esp. Ca. 106.

(160) In Pennsylvania, an action for the purchase-money produces the same fruit as a bill in equity; for there it is the only resort of carrying the contract into full effect; permitting the defendant, under the plea of payment, to give in evidence every circumstance which would influence a chancellor on a bill for specific performance. In Huber v. Burke, (11 S. & R. 238.) which was debt to recover the penalty in articles of agreement; and held, that in that action the vendor may go for damages only, and retain the land; in which case the breach must be assigned exactly in the same way as where he would go for the purchase-money, if that were permitted him. But to permit him, said the Court, Gibson J., to go either for damages or the purchase-money, according to the case he might be able to make out, would involve the absurdity of an arbitrary discretion in the jury, to hold the vendee to the bargain, or absolve him from it, on payment of a compensation in damages; which it was determined in Witman v. Ely, 4 S. & R. 266, they cannot exercise. The vendor ought therefore to count specifically for the purchase-money as such. That may be done in an action of debt, directly on the covenant to pay, by setting out the covenant, performance on his own part, and failure on the part of the vendee, and concluding in the usual form. Debt on covenant may be supported at common law; but he is not entitled to recover the whole purchase-money, if there be incumbrances remaining; for the vendee should be in a condition to tender a title, at least before suit brought. Damages, therefore, and not the price of the land, are the legitimate fruit of an action in this form. But in the case of Cassell v. Cooke, 8 S. & R. 268, it was held, that a defendant was not entitled to reduce the purchase-money sued for by proof of special damage sustained by reason of the deed not being delivered to him on the day stipulated, without first showing that he offered to pay the purchase money.

The law would seem to be settled in Pennsylvania from the case of Steinhauer v. Witman, 1 S. & R. 438 to the present time, that a vendee may avail himself of a defence against paying the purchase-money, founded on defect of title, even where he had accepted of a conveyance with special warranty only. And in Hart v. Porter, 5 S. & R. 201, it was held, that a defendant who is sued for the purchase-money may de-

A writ of ne exect regno lies against a purchaser (\*)who has not paid the purchase-money, upon his threatening to go abroad, if the vendor's title has been accepted(g), or there has been a decree for a specific performance after the title has been investigated(h). But although the purchaser has taken possession of the property, and received the rents after the delivery of the abstract, yet the writ cannot issue; for unless the Court can make it out to be quite clear that there must be a specific performance, it cannot grant the writ(i).

If a man convey his estate to trustees to sell and pay debts, and afterwards file a bill to stop the sale, on the ground that the trustees, by giving shorter notice of the intended sale than was usual, and other circumstances, would materially injure the sale, the Court will not grant an injunction upon the filing of the bill to restrain the sale, although it is sworn that the sale is to be made the next day. It is not one of those cases in which, on account of irreparable injury to the plaintiff, the Court proceeds in this summary way. If the trustees shall be guilty of a

<sup>(</sup>g) Goodwin v. Clarke, 2 Dick. 497; and Anon, ibid. note; see Jackson v. Petrie, 10 Ves. jun. 164.

<sup>(</sup>h) Boehm v. Wood, 1 Turn. & Russ. 332.

<sup>(</sup>i) Morris v. M'Neil, 2 Russ. 604.

fend himself on account of a defect in the title, though there be no covenants on which he can have recourse; and in a case where there has been no eviction. Tilghman, C. J. concluded his judgment of the court thus:—" Considering then, that it was decided in Steinhauer v. Witman, that a purchaser not having paid his money, may defend himself under a defect of title, where part of his purchase has been evicted, although he has accepted of a conveyance with no more than special warranty, and considering that where there has been no eviction, it would be against equity, to compel payment of the whole purchase-money, for a defective title." It is to be understood, that this opinion is confined to the case of a purchaser who has no covenants on which he can have recourse to the seller. 7 ib. 43.

breach of trust in making the proposed sale, they will be answerable to the plaintiff for the damage sustained (k).

Where a man sells an estate for an annuity, without any agreement being made respecting the security to be given for it, he is entitled to have it secured, not only upon the estate, but also by the bond of the purchaser, and a judgment to be entered up against  $\lim(l)$ . In Ker v. Clobery(m), which came before the Court upon a petition between the heir and executor, it appeared that the (\*)equity of redemption was sold to the mortgagee for the mortgage-money, and a life-annuity to be paid to the seller and his wife, and the survivor of them, but nothing was said as to the mode in which the annuity was to be secured. It was held to be a purchase of the equity of redemption, subject to the annuity, which ought to be charged on the estate. It was an interest reserved by the seller out of the estate.

A purchaser of an estate subject to incumbrances must indemnify the vendor against them, although he did not expressly engage to do so.

Thus a purchaser of a leasehold estate must covenant with the vendor to indemnify him against the rents and covenants in the lease, although he is not required to do so by the agreement for sale(n).

So, although a purchaser of an equity of redemption enter into no obligation with the party from whom he purchases, to indemnify him from the mortgage-money, yet equity, if he receives the possession, and has the profits, would, independently of contract, raise upon his conscience an obligation to indemnify the wendor against the personal obligation to pay the mortgage-money; for hav-

<sup>(</sup>k) Pechell v. Fowler, 2 Anstr. 550.

<sup>(1)</sup> Remington v. Deverall, 2 Anstr. 550.

<sup>(</sup>m) V. C. 27 Mar. 1819, MS.

<sup>(</sup>n) Pember v. Mathers, 1 Bro. C. C. 52, et supra, p. 38. (\*251)

ing become owner of the estate, he must be supposed to intend to indemnify the vendor against the mortgage(o).

And if a purchaser who has not obtained a conveyance sell to another, the second purchaser is, without entering into a covenant, bound to indemnify him against any costs incurred in proceedings for his benefit (p).

If a seller agree to give a real security as an indemnity to a purchaser upon his accepting the title, he will be compelled specifically to perform it, although he has not (\*) sufficient real estate, and offers a sufficient security upon personal estate.(q).

It seems that where a mortgagor has agreed to convey his equity of redemption to the mortgagee, the proceedings in an ejectment by the mortgagee cannot be stopped under the 7 Geo. 2, c. 20, for the effect of it would be to strip the mortgagee of his legal title, which might let in a posterior equitable right to the prejudice of the mortgagee, though he should thereafter obtain a decree for the performance of the agreement(r). But the relief will be granted to the mortgagor, where the mortgagee has not taken any steps to complete his contract for the purchase of the equity of redemption(s.)

A purchaser of an estate let to a tenant from year to year may, without a new contract, or any act corresponding to attornment, recover the rent; and nothing would be a good defence in an action brought for it but the fact that he did not know of the sale, and had paid his rent before to his lessor(t). So, if the estate is in lease, the purchas-

<sup>(</sup>o) See 7 Ves. jun. 337, per Lord Eldon; see Crafts v. Tritton, 8 Taunt. 365; 2 Moo. 411, S. C.

<sup>(</sup>p) Per Lord Eldon, in Wood v. Griffith, 12 Feb. 1818, MS.

<sup>(</sup>q) Walker v. Barnes, 3 Madd. 247.

<sup>(</sup>r) Goodtitle v. Pope, 7 Term Rep. 185.

<sup>(</sup>s) Skinner v. Stacy, 1 Wils. 80.

<sup>(</sup>t) See 1 Vern. & Scriv. 289; Birch v. Wright, 1 Term Rep. 378. See Lumley v. Reisbeck, 15 East, 99.

er is entitled to the benefit of covenants entered into by the lessee with the vendor(u), and may recover for a breach of the covenants before his time, if he is seized of the reversion during the continuance of the term(x); and he may, after notice to the tenant of the conveyance, distrain for rent in arrear(y), whether the estate be freehold or leasehold(I).

(u) See post, ch. 13, sect. 1, n. (1).

- (x) Davis's case, M. T. 42 Geo. III. Woodfall's Land. and Ten. 529, 2d edit.
- (y) See Moss v. Gallimore, Dougl. 259; Pope v. Biggs, 9 Barn. & Cress. 245; 4 Man. & R. 193, S. C.

(I) It was recently proposed to deprive all middle-men, even in England, of the right to distrain for rent in arrear. Thus, suppose a building lease to be granted by John to James for ninety-nine years, at 101. a year; James builds a valuable house, and underlets to Joseph, for forty years, at 1001. a year; and Joseph underlets to Jacob, for thirty years, at 1201. a year; it is manifest that James has the greatest interest in the property; and, as the law now appears to stand, he can distrain for his rent, notwithstanding the last underlease. This right was proposed to be taken from him, but the measure was dropped.

In support of the measure, it was contended, that none but the original essor is entitled to distrain for rent, according to the law of England; and therefore that, in the case which I have put, James would not be affected by the act; because he would not, as the law now stands, be entitled to distrain. The argument, which was managed with great ingenuity, was rested upon the statute of quia emptores, and some passages in Coke upon Littleton. When it is considered, that the right of distress, in the case above supposed, has never been disputed, it will not be matter of surprise, that the attempt to show that the practice is illegal did not succeed. That rent may be distrained for, although fealty is not incident to it, is laid down in Co. Litt. 142, b.; and it seems to be clear. that distress is incident to every rent at common law, where the lessor has a reversion: and that a reversion of a single day is, for this purpose, as operative as a reversion in fee. In the year-book, 14 Edw. III. p. 8. Finchden thought, that if a lessee leased all his estate rendering rent, he could not distrain; he had no reversion. In the 2d Edw. IV. p. 11, the very objection was taken, where the lessor had a reversion; because it was only the reversion of a chattel; but it was held, that he had a right

- (\*) If a person having a right to an estate, purchase it of another person, being ignorant of his own title, equity (\*) will compel the vendor to refund the purchase-money, with interest from the time of bringing the bill, although no fraud appear(z)(161).
- (z) Bingham v. Bingham, 1 Ves. 126. See Lansdown v. Lansdown, Mose. 364; Saunders v. Lord Annesley, 2 Scho. & Lef. 101; Leonard v. Leonard, 2 Ball & Beatty, 171.

to distrain. In Brooke's Abridgment, Distress, case 45, and Rents, case 17, it is laid down, on the authority of this case, that if a man lease for twenty years, and the lessee leases over for ten years, rendering rent, there, if he grant the rent over to another man, he cannot distrain; because he has not the reversion of the term, which gives the right to distrain: contrary, if he had granted to him the reversion and the rent. Note the diversity. In Wade v. Marsh, Latch, 211, it was held, that the lessor having only a reversion for years, may, by the common law distrain for the rent, by reason of the reversion, which causes privity. These cases appear to be quite decisive. The only difficulty has been to find a case; for the point has not been doubted for centuries. It is to be hoped, therefore, that the right of mesne landlords to distrain for rent will not be violated, on the ground that it depends upon a practice not sanctioned by law, and which ought to be abolished; but if it shall appear, as it is alleged, that the remedy has been the source of great oppression against the tenantry of Ireland, the Legislature will, I confidently hope, extend its protection to so valuable a race of men, as far as may be consistent with a due regard to the rights of landlords: for, as Justice Twisden observed, we must not steal leather to make poor men's shoes.

<sup>(161)</sup> The case of Lawrence v. Beaubien, 2 Bailey's S. C. R. 623, decided that a mistake of law was a ground of relief from the obligations of a contract, by which one party acquired nothing, and the other neither parted with any right, nor suffered any loss, and which ex aequo et bono ought not to be binding; and it made no difference, that the parties were fully informed of the facts, and the mistake as to the law was reciprocal. But the evidence should show a palpable mistake, and not mere ignorance of the law. The mere compromise, however, of a doubtful right will not be a ground of setting aside the contract. Johnson, J. said "it was well remarked in Fletcher v. Tollet, 5 Ves. 14, that 'ignorance is not mistake.'" In Shotwell v. Murray, 1 J. Ch. 512,

So where a person sold a remainder expectant upon an estate-tail, and both parties considered that the remainder was unbarred, and it afterwards appeared that a recovery had been suffered before the contract, the purchaser was relieved against a bond which he had given for the purchase-money, and the seller was compelled to repay the interest which he had received(a). This was a strong decision. The purchaser might have ascertained the fact by search. The Chief Baron laid down some very general propositions. His Lordship said, "that if a person sell an estate, having no interest in it at the time, and takes a bond for securing the payment of the purchase-money, that is certainly a fraud, although both parties

## (a) Hitchcock v. Giddings, 4 Price, 135.

and Lyon v. Richmond, 2 ib. 56, Chancellor Kent seems to have adopted the cases of Bilbie v. Lumley, 2 East, 469 and Brisbane v. Dacres, 5 Taunt. R. 143, as an authority upon the point, but neither of these cases turned upon the precise point. In the first, the mistake was in relation to a collateral matter; and the last was judicium red ditum in invitum. The learned judge after citing Lansdown v. Lansdown, Mosely, 364; Bingham v. Bingham, 1 Ves. Sen. 126; and the dicta of Ch. J. De Grey, 2 Wm. Bl. 825, Lord Mansfield in Bize v. Dickason, 1 Term, 286 in support of his position: then proceeded to the case of Hunt v. Rousmanier, 8 Wheat. R. 215 in which Chief J. Marshall remarks, that "although we do not find the naked principle, that relief may be granted on account of ignorance of the law asserted in the books, we find no case in which it has been decided, that a plain and acknowledged mistake in law is beyond the reach in equity." And in remarking on the case of Lansdown v. Lansdown, he observes, that although objectionable in other respects; "yet, as a case in which relief has been granted on a mistake in law, it cannot be entirely disregarded." And although the case of Hunt v. Rousmanier ultimately turned upon another question, see 1 Pet. 1, it shows very clearly the opinion of that great jurist. See the argument of the learned editor of Pothier, 2 Evans Poth., app. 269. "For myself, I have no hesitation in coming to the conclusion, that contracts, founded on a plain and palpable mistake of the law, from a known state of facts, and capable of proof, ought not to be enforced. O'Neall, J. concurred.

should be ignorant of it at the time (b). Suppose I sell an estate innocently, which at the time is actually swept away by a flood, without my knowledge of the fact, am I to be allowed to receive 5,000l. and interest, because the conveyance is executed, and a bond given for that sum as the purchase-money, when, in point of fact, I had not an inch of the land so sold to sell(c)?" Both these cases, when they arise, will, it is apprehended, deserve (\*)great consideration before they are decided in the purchaser's favor. The decision must be the same, whether the money is actually paid or only secured(d)(I)(162).

In Haven v. Foster, 9 Pick 112, where the plaintiff as administrator on an estate paid over to the defendant by mistake of the laws of descent of New York the money sought to be recovered back in this action; held, that he was entitled to recover. The lex loci rei sitae must govern the descent of real estate. The parties knew that the intestate died seized of lands in New York. The distribution was governed by

<sup>(</sup>b) But see 2 Cro. 196; 2 Ld. Raym. 1118; 1 T. Rep. 755; 2 Freem. 106; and post, ch. 9, s. 6.

<sup>(</sup>c) See ch. 5, s. 2, post.

<sup>(</sup>d) See post, ch. 9, s. 6.

<sup>(</sup>I) In a late case before Lord Eldon, his Lordship expressed considerable doubt upon the doctrines in the case in the Exchequer.

<sup>(162)</sup> The principle asserted in the text, seems to rest upon the ground that the maxim ignorantia juris non excusat, is applicable only in the administration of criminal law. In Lansdown v. Lansdown, cited ut supra, the Lord Chancellor says, "That Maxim of law, ignorantia juris non excusat, was in regard to the public, that ignorance cannot be pleaded in excuse of crimes, but did not hold in civil cases." See Levy v. Bank U. S. 1 Binn. 27, 37. acc. ut semb. But a contrary doctrine was held by Chancellor KENT in Lyon v. Richmond, 2 Johns. Ch. Rep. 51, 60. "The courts" he says, "do not undertake to relieve parties from their acts and deeds fairly done on a full knowledge of facts, though under a mistake of the law. Every man is to be charged at his peril, with a knowledge of the law. There is no other principle which is safe and practicable in the common intercourse of mankind." See also, Shotwell v. Murray, 1 Johns. Ch. Rep. 516. Storrs v. Barker, 6 Johns. Ch. Rep. 166.

Where a policy of assurance on a life was sold by auction, and the particulars did not state that the seller had only a redeemable interest in the life assured, and the interest was afterwards redeemed, it was held that after the purchase was completed the purchaser could not recover damages for the fraud, as it was proved that the practice of the office was to pay such policies, although of course there was no legal right to recover under the policy (e).

If a lease be granted with power to the lessee to cut and sell the timber, and the lessee is required when and so often as he intends to sell the timber, or any part thereof, to give notice to the lessor to whom the pre-emption was given; the lessee having a bona fide intention to cut down all the timber, may give a general notice to the lessor, and if the lessor decline to purchase the timber, the lessee may cut it down at intervals, and need not repeat the notice (f).

A bona fide purchase of an interest will not be converted into a loan, on account of a power to re-purchase being given to the seller, although at an advanced price;

(e) Barber v. Morris, 2 Mood. & Malk. 62.

(f) Goodtitle v. Saville, 16 East, 87. See Doe v. Abel, 2 Mau. & Selw. 541.

the laws of that state. The statute of New York is a fact, the ignorance of which may be ground of repetition. The defendant received a part of the consideration of these lands by mistake in a matter of fact—the law of New York. The estate in New York was under mortgage; and the mortgage was satisfied from the estate itself. The heirs agreed to pay off the mortgage; and the plaintiff supposing he owned but a quarter, when he owned half made the agreement in respect to the distribution of the proceeds of these lands. The agreement was founded in mistake, but it has been executed, as the parties cannot be restored to the situation they were in when it was made, and as the effect of annulling to one would work injustice to another, we can see no good reason why both should not be bound by it.

but, if the purchaser, instead of taking the risk of the subject of the contract (e. g. an annuity) on himself, take a security for repayment of the principal, that will vitiate the transaction, and render it a mere mortgage security(g)(163).

(\*)If a power to re-purchase be given upon a condition, for example, that rent be in the mean time regularly paid, the right cannot be enforced unless the condition has been complied with, for it is not a stipulation for penalty or forfeiture but a privilege conferred (h)(164).

- (g) Verner v. Winstanley, 2 Scho. & Lef. 393. See Sevier v. Greenway, 19 Ves. jun. 413.
  - (h) Davis v. Thomas, 1 Russ. & Myl. 506.

(163) See Jackson v. Green, 4 Johns. Rep. 187. Erskine v. Townsend, 2 Mass. Rep. 493.

(164) The principle of this decision was recognized in the late case of Robinson v. Cropsey and others, 2 Edward's V. Ch. R. 138, where the question was as to the effect of an agreement. It appeared that one Sharp and the complainant had joined in building a house upon two lots of land. Sharp and wife executed a conveyance of one undivided moiety of said lots; and also of a moiety of two other lots. A consideration was expressed, but not then paid. Subsequently, however, the parties agreed under their hands and seals thus: Sharp was to convey to the complainant the whole of said lots with four other lots, free of incumbrance, except a mortgage, which the latter was to pay:-in consideration whereof the complainant was to cancel an account current; and also certain mortgages he held. Sharp agreed also to lease certain lots for 19 years at a stipulated rent. The agreement also gave to Sharp "the privilege of redeeming said house and lands within one year for a sum therein mentioned. In pursuance of this agreement, Sharp executed a deed conveying the other four lots; and the complainant had been in possession since that time. The question for the court was whether this was a conditional sale or a mere mortgage transaction. The V. Chan. decreed that the defendants, as the representatives of Sharp, had no right to redeem or re-purchase under the the agreement. The grounds of this decision were that the relation of debtor and creditor did not remain by the agreement; but the debt forming the consideration of the conveyance was extinguished by the agreement; and the grantor retained the privilege of refunding the money if he should choose to do it. The enquiry, says Chief J. Mar-(\*256)

Where a power is given by an Act of Parliament to purchase the estate of a third person for a public purpose, with the usual provisions for ascertaining its value, if the terms offered are not accepted; the party empowered to purchase, if he give a regular notice to purchase, cannot withdraw from it, but will be compelled to take the estate(i).

It may here be observed, that the grant of the office of a steward of a manor for life is not revoked by a subsequent sale of the manor, but is binding on the purchaser; although, as lord, he will be entitled to the custody of the court-rolls. In purchasing a manor, therefore, the instrument by which the steward was appointed should be called for. This is a precaution which has never been attended to.(165).

(i) The King v. Hungerford Market Company, 1 Nev. & Mann. 112.

shall in Conway's executors v. Alexander, 7 Cranch, 218. must be, whether the contract, in the specific case, is a security for the repayment of money or an actual sale. If a mortgage is intended, the mortgagee must have a remedy against the person of the debtor: if this remedy really exists, its not being reserved in terms will not affect the case; but the remedy must exist, in order to justify a construction which overrules the express words of the instrument." When the mortgages, &c. were cancelled, they were extinguished; and by the agreement went to pay the consideration money.

(165) Parsons Ch. J. "If a grantor deliver any writing as his deed to a third person, to be delivered over by him to the grantee on some future event, it is the grantor's deed presently, and the third person is a trustee of it for the grantee. And if the grantee obtain the writing from the trustee before the event happen, it is the deed of the grantor, and he cannot avoid it by the plea of non est factum, whether generally or specially pleaded. But if the grantor make a writing and seal it, and deliver it to a third person, as his writing or escrow, to be by him delivered to the grantee, upon some future event, as his the grantor's deed; and it be delivered to the grantee accordingly, it is not the grantor's deed until the second delivery. And if the grantee obtain the possession of it before the event happen, yet it is not the grantor's deed, and he may avoid it by pleading non est factum.

But if the deeds are delivered to a person, not as the deeds, but as the writings of the grantor, we must not thence conclude they are void. Although generally an escrow takes its effect from the second delivery, yet there are excepted cases, in which it takes effect, and is considered the deed of the maker, from the first delivery. The exception is founded on necessity, ut res valeat. If a feme sole seal a writing, and deliver it as an escrow, to be delivered over on condition, and she afterwards marry, and the writing be then delivered over on performance of the condition, it shall be her deed from the first delivery; otherwise her marriage would defeat it. A. delivers a deed, as an escrow, to J. S. to deliver on condition performed, before which it becomes non compos mentis: the condition is then performed, and the deed delivered over; it is good, for it shall be A's. deed from the first delivery. Brook's Reading on the st. of limitations, p. 150. Another exception is in 3 Co. 35 b. 36 a. Lessor makes a lease by deed, and delivers it as an escrow, to be delivered over on condition performed, before which lessor dies, and after it is delivered over on condition performed: the lease shall be the deed of the lessor from the first delivery. There is also a strong exception in 5 Co. 85. If a man deliver a bond as an escrow, to be delivered on condition performed, before which the obligor or obligee dies, and the condition is after performed: here there could be no second delivery, yet is it the deed of the obligor from the first delivery, although it was only inchoate: but it shall be deemed consummate by the performance of the condition. Therefore in Wheelwright v. Wheelwright, 2 Mass. 447, where the statute authorized any person of full age seized in fee tail of any lands by deed duly executed before two subscribing witnesses, acknowledged and registered as therein provided, for agood and valuable consideration bona fide to convey such lands or any part thereof in fee simple to any person capable of taking and holding such estate; and such deed, so made, executed, acknowledged and registered shall bar all estates-tail in such lands, and all remainders and reversions expectant thereon. In this case the deeds were executed and delivered to one Wells, not as the deeds of the grantor, but as his writings or escrows, to be delivered as his deeds by Wells to the grantee on his, the grantor's death. The Court held, that the deeds must take their effect, and be considered as the deeds of the grantor, from the first delivery, the grantor being dead at the second delivery.

What the nature of the delivery was, whether absolute or conditional, and the intentions of the parties were, are questions of fact for the jury, to be determined by the evidence. Hatch v. Hatch, 9 Mass. 307. In this case, the father about four years before his death, signed, sealed and vol. 1.

acknowledged the writings which were produced at the trial as his deeds, and which purported to be witnessed as deeds delivered. The grantees, who were the sons of the grantor were not privy to the execution; but the writings were deposited with one Turner, to be kept until the grantor's death, and then to be delivered to the grantees; held, that the sons should hold the estate.

In Clark v. Gifford, 10 Wend. R. 310, where there was no absolute delivery of the deed; the papers were deposited with a third person to be delivered when both parties should direct: held, that one party obtaining possession of a writing thus deposited, without the consent of the other, cannot be permitted to enforce it. "Take these deeds and keep them; if I never call for them, deliver one to Pamela, and the other to Noble after my death; if I call for them, deliver them up to me." The Court held that the reservation of a power to countermand the delivery over made no difference; for it was in the nature of a testamentary disposition of real estate, and was revocable by the grantor during his life, without any express reservation. The legal operation of such a deed is, that it becomes the deed of the grantor presently; that the third person is the trustee of the grantee; but the title is consummate in the grantee by the death of the grantor; and the deed takes effect by relation from the first delivery. Belden & al. v. Carter, 4 Day's R. 66.

Weston, J. 3 Greenl. R. 141. "A delivery of a deed may be by acts, or by words; or by both. It may be delivered by the party who made it, or by any other person, by his appointment or authority, precedent or assent subsequent. But if a man throws a writing on a table, and a party takes it, this does not amount to a delivery, unless it be found to have been put there, with intent to be delivered to the party. And upon the same principle, if the maker of a deed avails himself of the hand of the party for whom it is made, merely to put the deed in a trunk, desk or other place of deposit, within the control of the maker, and such purpose is indicated and made known at the time, there is no legal delivery; no act being done, or declaration made expressive of an intention to deliver."

In Austin v. Hall, 13 Johns. 285, where the deed was duly executed by the grantor, in his life time, and delivered to a third person, to be delivered to the grantees (sons of the grantor) in case the grantor should die before having made and executed his will. The Court considered it "questionable whether this deed is to be viewed as an escrow; the grantees had nothing to do, on their part, in order to make the deed absolute, which is usually the case where a deed is delivered as an escrow. The delivery here was, at all events, condi-

tional, and to become absolute upon an event which has taken place; and, as in the case of an escrow, the deed will take effect from the first delivery.

A deed delivered at the register's office, in the absence of the grantee, has been held to be a good delivery to the grantee; if he afterwards assent and take the deed. And where the sheriff lodged the deed with the clerk of the court for the use of the purchaser; he having paid the price; these proceedings being regular, were held to constitute an incumbrance. Chapel v. Bull, 17 Mass. 213. The man who executes a mortgage to the vendor for the payment of the purchase-money, must be presumed to have accepted the conveyance. 14 S. & R. 299.

In Ward v. Winslow, 4 Pick. 518, where the defendants, being insolvent made an assignment of their property, in trust to pay creditors. The bill prayed for an execution of the trust; but the defendants in their answers, admitted the execution of the deeds; they, however, also said, that the indenture was returned to them to obtain the signatures of the creditors; for the intent was that it should take effect only when a majority in interest of the creditors had signed it: And having subsequestly compounded with their creditors, the deed was annulled. One part was found in the hands of the assignees; another in the hands of the creditors; and was referred to in the adjustment which took place between certain of the creditors and the debtors. The Court considered "Where a deed, with the regular evidence of its execution upon the face of it, is found in the hands of the grantee, the presumption is that it has been duly delivered. It could not have been delivered as an escrow, because it was delivered to the parties; an escrow can be delivered only to a third person. It could not have been delivered to the parties conditionally, to take effect upon the happening of any future contingency, because this would be inconsistent with the terms of the instrument itself. To permit parties to a deed purporting to be absolute, to show by parol evidence that it was conditional, and to avoid it for a non-performance of the condition, would be not only a violation of the fundamental rules of evidence, but productive of great injustice and mischief."

## (\*)CHAPTER V.

OF THE CONSIDERATION.

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## SECTION I.

Of unreasonable and inadequate Considerations.

I. It seems that a court of equity cannot refuse to assist a vendor merely on account of the price being unreasonable (a): and a specific performance will certainly be enforced, if the price was reasonable at the time the contract was made, how disproportionable soever it may afterwards become (166).

If, however, a man be induced to give an unreasonable price for an estate, by the fraud(b)(167), or gross misrepresentation(c), of the vendor; or by an industrious con-

- (a) City of London v. Richmond, 2 Vern. 421; Hanger v. Eyles, 2
  Eq. Ca. Ab. 689; Hicks v. Philips, Prec. Cha. 575; 21 Vin. Abr. (E),
  n. to pl. 1; Keen v. Stukeley, Gilb. Eq. Rep. 155; 2 Bro. P. C. 396;
  Charles v. Andrews, 9 Mod. 151; Lewis v. Lord Leechmere, 10 Mod. 503; Saville v. Saville, 1 P. Wms. 745; Adams v. Weare, 1 Bro. C.
  C. 567; and the cases, as to inadequacy of price, cited infra.
- (b) See James v. Morgan, 1 Lev. 111, a case at law. Conway v. Shrimpton, 5 Bro. P. C. last edit. 187.
  - (c) Buxton v. Cooper, 3 Atk. 383.

<sup>(166)</sup> See Osgood v. Franklin, 2 Johns. Ch. Rep. 1, 23. The same case was affirmed on appeal. 14 Johns. Rep. 527.

<sup>(167)</sup> Fraud will vitiate any contract: No rule of law is more universal than this. See Wilson v. Force, 6 Johns. Rep. 110. (\*257)

cealment of a defect in the estate(d), equity will not compel him to perform the contract.

And where these circumstances do not appear, but the estate is a grossly inadequate consideration for the purchase-money, equity will not relieve either party. Thus (\*)in a case at the Rolls before Lord Alvanley, by original and cross-bill, the estate was represented on the one hand of the value of 9 or 10,000l.; and on the other of only 5,000l. The contract was for 6,000l., and 14,000l. at the death of a person aged sixty-five. Lord Alvanley said, it was not a case of actual fraud; but it was insisted the bargain was grossly inadequate; and the inadequacy was very great: it was impossible upon the whole evidence to make the estate to be worth more than 10,000l.; though he ought not to decree a performance, yet as no advantage was taken of necessity, &c. he was not warranted to decree the vendor to deliver up the contract, the only inconvenience of which would be, that an action would lie for damages; and he accordingly dismissed both bills(e).

Indeed few contracts can be enforced in equity where the price is unreasonable, because contracts are not often strictly observed by either party; and if an unreasonable contract be not performed by the vendor, according to the letter in every respect, equity will not compel a performance in specie(f)(168).

But there are few cases in which a purchaser could be relieved after the conveyance is executed and the purchase completed, on account of the unreasonable price(g).

- (d) Shirley v. Stratton, 1 Bro. C. C. 440.
- (e) Day v. Newman, 2 Cox, 77; 10 Ves jun. 300, cited; and see Squire v. Baker, 5 Vin. Abr. 549, pl. 12.
- (f) See the cases cited in n. (a), ante; and Edwards v. Heather, Sel. Cha. Ca. 3.
  - (g) Small v. Attwood, 1 Yo. Rep. 407.

In Small v. Attwood(h), where the contract was rescinded; after the decree setting it aside and directing the accounts to be taken, the purchasers filed a supplemental bill, stating the payment of 200,000l., part of the purchase-money (which was paid long before the bill was filed), and tracing the investment of it in stock, and the (\*)transfer of the stock to a third person without consideration as it was alleged, and praying that they, without prejudice to their lien on the estate of which they were in possession, might be decreed to be entitled to the specific stock. And Lord Lyndhurst, C. B., so decided, although the money was paid in consideration of the possession of the estate being given to the purchasers, with which they had acted as owners. They had long had possession, which they retained, of the estate, and a lien upon it for what they had paid; and they thus also obtained the property which had been bought with the portion of the purchase-money paid. This is the first case in which equity ever followed the purchase-money, and ordered it specifically to be restored. The author refrains from further observing upon this decision, as it is now upon appeal in the House of Lords.

II. It appears to be settled, that mere inadequacy of price is not a sufficient ground for a court of equity to refuse its assistance to a purchaser(i), particularly where the estate is sold by  $\operatorname{auction}(k)(169)$ .

(h) Rep. p. 101.

<sup>(</sup>i) Coles v. Trecothick, 9 Ves. jun. 234; Burrows v. Lock, 10 Ves. jun. 470. See Young v. Clark, Prec. Cha. 538; Barrett v. Gomeserra, Bunb. 94; Underwood v. Hithcox, 1 Ves. 279; Mortlock v. Buller, 10 Ves. jun. 292; and Lowther v. Lowther, 13 Ves. jun. 95; Western v. Russell, 3 Ves. & Bea. 187.

<sup>(</sup>k) White v. Damon, 7 Ves. jun. 30. See Collet v. Woollaston, 3 Bro. C. C. 228.

<sup>(169)</sup> See Butler v. Haskell, 4 Des. 651, 678. Wherein the question (\*259)

In White v. Damon, however, although the estate was sold by auction, Lord Rosslyn dismissed the bill merely on account of the inadequate price given for the estate, viz. 1,120l. and it was worth 2,000l.; but on a rehearing before Lord Eldon, although the decree was affirmed upon a different ground, yet his Lordship said, he was (\*)inclined to say that a sale by auction, no fraud, surprise, &c. cannot be set aside for mere inadequacy of value. It would be very difficult, he said, to sustain sales by auction, if the Court would not specifically perform the agreement. And in a subsequent case(l), his Lordship expressed the same opinion, and referred to the case of White v. Damon.

But if an uncertain consideration (as a life-annuity) be given for an estate, and the contract be executory, equity it seems will enter into the adequacy of the consideration(m).

Although a purchaser is not bound to acquaint the vendor with any latent advantage in the estate(n), yet a concealment, for the purpose of obtaining an estate at a grossly inadequate price, may be deemed fraudulent (170).

(1) Ex parte Latham, 7 Ves. jun. 35, note.

(m) Pope v. Root, 7 Bro. P. C. 184; Mortimer v. Capper, 1 Bro.
C. C. 156; and Jackson v. Lever, 3 Bro. C. C. 605.

(n) See 2 Bro. C. C. 420.

as to inadequacy of price is very fully discussed; and where the English decisions are reviewed. Inadequacy of price not a sufficient ground for setting aside a sale; unless it be so gross as of itself to amount to evidence of fraud. Osgood v. Franklin, 2 Johns. Ch. Rep. 1, 23. An agreement for the sale of a present interest in a valuable estate, which is executed, will not be set aside on the ground of mere inadequacy of price; there being no fraud, concealment, or misrepresentation. Gregor v. Duncan, 2 Des. 636. Livingston v. Byrne, on appeal, 11 Johns. Rep. 555.

(170) Equity we relieve against a contract of sale of lands, where the purchaser had discovered salt water on the premises, and in
(\*260)

Thus in the case of Deane v. Rastron(o), an agreement was made for sale of land at a halfpenny per square yard. The price was in all about 500l., the real value 2,000l. The purchaser went out to an attorney, got him to calculate the amount, and desired him not to tell the vendor how little it was; then carried the agreement to the vendor, and prevailed on him to sign it immediately. The Court of Exchequer said, the desire of concealment would be such a fraud as to void the transaction, as parties to a contract are supposed, in equity, to treat for what they think a fair price.

So a misrepresentation by the purchaser, who was the agent of the seller, of the value of the estate, although it operated only to a small extent, has been held to be a (\*)sufficient defence against a bill for a specific performance; for to entitle a person to call for the aid of a court of equity, he must go there with clean hands(p)(171).

Where neither of the parties knows the value of the estate, at the time the contract is entered into, no inadequacy of consideration will operate as a bar to the aid of equity in favor of the purchaser.

Thus, in a case (q) where a common was to be inclosed, one man having a right of common, agreed, before the commissioners had made any allotment, or any one could know what it was to be, to sell his allotment for 20l. Af-

- (o) 1 Anstr. 64; and see Young v. Clerk, Prec. Cha. 538; Lukey v. O'Donnell, 2 Sch. & Lef. 466.
- (p) Cadman v. Horner, 18 Ves. jun. 10; Wall v. Stubbs, 1 Madd. 80.
- (q) Anon. 1 Bro. C. C. 158; 6 Ves. jun. 24, cited; but see 2 Atk. 134.

dustriously and artfully concealed the fact from the vendor. Bowman v. Bates, 2 Bibb, 52. See Eichelberger's Les. v. Baruitz, 1 Yeates, 312.

<sup>(171)</sup> See Parker v. Carter, 4 Munf. 288. Moseley's Exr. v. Buck,3 Munf. 233.

<sup>(\*261)</sup> 

terwards it turned out to be worth 200l. Sir Joseph Jekyll said, the contract ought to be enforced, as no one could know what the allotment would be; and both parties were equally in the dark; but it might be different if the circumstances had been known to the plaintiff.

But, whether an estate is sold by auction, or by private agreement, equity will be as vigilant in discovering an excuse for refusing to perform the contract, where the price is inadequate, as it will where the consideration is unreasonable(r).

III. A conveyance executed will not, however, be easily set aside on account of the inadequacy of the consideration; for there is a great difference between establishing and rescinding an agreement(s)(172). It is not sufficient to (\*)set aside an agreement in equity, to suggest weakness and indiscretion in one of the parties who has engaged in it; for supposing it to be in fact a very hard and unconscionable bargain, if a person will enter into it with his eyes open, equity will not relieve him upon this footing only, unless he can show fraud in the party contracting with him, or some undue means made use of to draw him

<sup>(</sup>r) Whorwood v. Simpson, 2 Vern. 186; Emery v. Wase, 5 Ves. jun. 846; 8 Ves. jun. 505; Twining v. Morris, 2 Bro. C. C. 326; and see the cases cited in n. (a), supra; and see Mortlock v. Buller, 10 Ves. jun. 292; Maddeford v. Austwick, 1 Sim. 89.

<sup>(</sup>s) See Dews v. Brandt, Sel. Cha. Ca. 7; Cases, Dom. proc. 1728; Hamilton v. Clements, Cas. Dom. Proc. 1766. See Small v. Attwood, 1 You. 407.

<sup>(172)</sup> See Osgood v. Franklin, 2 Johns. Ch. Rep. 23. In this case, KENT Chancellor, said, "Though inadequacy of price is not a ground for decreeing an agreement to be delivered up, or a sale rescinded, (unless its grossness amount to fraud) yet it may be sufficient, for the court to refuse to enforce performance. It is not an uncommon case for the court to refuse to enforce, for inadequacy, and at the same time refuse to rescind." See Clitherall v. Ogilvie, 1 Des. 250, 260. and note, p. 258, 259, 260. See also, Gregor v. Duncan, 2 Des. 636.

into such an agreement(t). To set aside a conveyance, there must be an inequality so strong, gross and manifest, that it must be impossible to state it to a man of common sense, without producing an exclamation at the inequality of it(u). The truth is, that in setting aside contracts, on account of an inadequate consideration, the Court proceeds on fraud. In all such cases, however, the basis must be gross inequality in the contract, otherwise the party selling cannot be said to be in the power of the party buying; unless actual imposition is proved by gross inequality, other circumstances of fraud will pass for nothing; the basis must be gross inequality(x)(173).

But a conveyance obtained for an inadequate consideration, from one not conusant of his right, by a person who had notice of such right, will be set aside, although no actual fraud or imposition is proved (y)(174).

So if advantage is taken of the distress of the vendor,

- (t) Per Lord Hardwicke, Willis v. Jernegan, 2 Atk. 251.
- (u) Per Lord Thurlow in Gwynne v. Heaton, 1 Bro. C. C. 1; and see Stephens v. Bateman, 1 Bro. C. C. 22; Floyer v. Sherard, Ambl. 18; Heathcote v. Paignon, 2 Bro. C. C. 167, and the cases there cited; Spratley v. Griffiths, 2 Bro. C. C. 179, n.; Low v. Barchard, 8 Ves. jun. 133; Underhill v. Horwood, 10 Ves. jun. 209; 14 Ves. jun. 28; Verner v. Winstanley, 2 Scho. & Lef. 393; Mac Ghee v. Morgan, Bruce v. Rogers, ib. 395; Darley v. Singleton, 1 Wight. 25; Evans v. Brown, ib. 102; Ex parte Thistlewood, 1 Rose, 290; Stilwell v. Wilkins, 1 Jac. 280.
  - (x) Per Lord Thurlow in Gartside v. Isherwood, 1 Bro. C. C. 558.
- (y) See Evans v. Luellyn, 2 Bro. C. C. 150; and the cases cited in the next note.
- (z) Herne v. Meers, 1 Vern. 465; 1 Bro. C. C. 176, n.; Gould v. Okenden, 4 Bro. P. C. by Toml. 193; Farguson v. Maitland, Gro.

<sup>(173)</sup> See Gregor v. Duncan, 2 Des. 636, 639. Clitherall v. Ogilvie, 1 Des. 259; and note, p. 258. Osgood v. Franklin, 2 Johns. Ch. Rep. 23. Butler v. Haskell, 4 Des. 687, 697. See also, Howell v. Baker, 4 Johns. Ch. Rep. 118. Osgood v. Franklin, 2 Johns. Ch. Rep. 24. Per KENT.

<sup>(174)</sup> See Butler v. Haskell, 4 Des. 651, 697.

(\*)the sale will be set aside(z): and this was done in one case, although the purchaser was really run to great hazard, and was to be at great expense and trouble in many foreseen and unavoidable law-suits about the estate, the issue of which was very doubtful(a)(175).

The reader will perceive that in this chapter a distinction is taken between contracts in *fieri*, and contracts actually executed; but in the case of Coles v. Trecothick(b), Lord Eldon appears to have been of opinion, that no such distinction exists. His Lordship said, that unless the inadequacy of price is such as shocks the conscience, and amounts in itself to conclusive and decisive evidence of fraud in the transaction, it is not a sufficient ground for refusing a specific performance(176).

IV. In treating of inadequacy of price, we must be careful to distinguish the cases of reversionary interests, the rules respecting which, especially where an heir is the vendor, depend upon principles applicable only to themselves, and not easily definable (c). The heir of a family dealing for an expectancy in that family, shall be distinguished from ordinary cases, and an unconscionable bargain made with him, shall not only be looked upon as oppressive in the particular instance, and therefore

and Rud. of Law and Eq. p. 89, pl. 1; Pickett v. Loggon, 14 Ves. 215; Murray v. Palmer, 2 Scho. & Lef. 474.

- (a) Gordon v. Crawford, before the House of Lords; Gro. and Rud. of Law and Eq. p. 92, pl. 16; Printed Cases Dom. Proc. 1730.
  - (b) 9 Ves. jun. 234; sed. qu. and see the cases cited in this chapter.
- (c) See 9 Ves. jun, 243; 2 Pow. Contr. 181; 3 Wooddes. 460, s. 7; Gilb. Lex Prætor. 291; 1 Trea. Eq. c. 11, s. 12, and Mr. Fonblanque's notes, *ibid*.

<sup>(175)</sup> See Osgood v. Franklin, 2 Johns. Ch. Rep. 24. Per KENT. Butler v. Haskell, 4 Des. 651. Bunch v. Hurst, 3 Des. 273.

<sup>(176)</sup> In Osgood v. Franklin, 2 Johns. Ch. Rep. 23. Kent, Chancellor, says, "There is a very important distinction, which runs through the cases, between ordering a contract to be rescinded, and decreeing a specific performance."

(\*263)

avoided, but as pernicious in principle, and therefore (\*) repressed (d). There are two powerful reasons why sales of reversions by heirs should be discountenanced; the one, that it opens a door to taking an undue advantage of an heir being in distressed and necessitous circumstances (e), which may perhaps be deemed a private reason: the other is founded on public policy, in order to prevent an heir from shaking off his father's authority, and feeding his extravagances by disposing of the family estate (f). Every case of this nature must, however, depend on its own circumstances; the Courts profess not to lay down any particular rules, lest devices should be framed to evade them (177).

- (d) Per Lord Thurlow, 1 Bro. C. C. 10. See Nott v. Hill, 1 Vern. 167; 2 Vern. 27; Berney v. Pitt, 2 Vern. 14; Earl of Ardglasse v. Muschamp, 1 Vern. 237; Twisleton v. Griffith, 1 P. Wms. 310; Curwyn v. Milner, 3 P. Wms. 293, n. (C); Sir John Barnardiston v. Lingood, 2 Atk. 133; Baugh v. Price, 1 Wils. 320; Gwynne v. Heaton, 1 Bro. C. C. 1; Bernal v. Donegal, 3 Dow, 133; Blakeney v. Bagott, 3 Bligh, N. S. 237.
  - (e) Sir John Barnardiston v. Lingood, 2 Atk. 133.
  - (f) Cole v. Gibbons, 3 P. Wms. 290. See Barnard. Cha. Rep. 6.

(177) See Osgood v. Franklin, 2 Johns. Ch. Rep. 25. Butler v. Haskell, 4 Des. 651, 687.

In Butler v. Haskell, 4 Des. 687, 688., DESAUSSURE, Chancellor, says, "there is a distinction made between the cases of young heirs selling expectances, and of others, which I am not disposed to support. It is said, that the former are watched with more jealousy, and more easily set aside than others, on principles of public policy. This was certainly true at first; but the eminent men, who have sat in chancery, have gradually applied the great principles of equity, on which relief is granted, to every case where the dexterity of intelligent men had obtained bargains at an enormous and unconscientous disproportion, from the ignorance, the weakness, or the necessities of others, whether young heirs or not." See Boynton v. Hubbard, 7 Mass. Rep. 112.

In Fitch v. Fitch, 8 Pick. 480, it was decided that a covenant entered into by an heir expectant, upon a valid consideration and with the consent of the father, to convey the estate which should come to him, was valid. "The Knowledge of the father, and his consent to the transaction is essential to its validity. Though no title passed by the (\*264)

The circumstance of the heir being unprovided for, will not prevail much in the purchaser's favor: the remoteness or uncertainty of the interest is not material, if the terms be unreasonable, nor can much stress be laid upon the purchaser incurring the risk of the loss of his money, in case the heir die before he come into possession; nor will the acquiescence of the seller during the continuance of the same situation in which he entered into the contract prejudice him(g).

The adequacy of the consideration is considered with reference to the time of the contract and not to the event, and the burden lies on the *purchaser* in these cases to show that a full and adequate consideration was

paid(h)(178).

(\*) A very anxious protection is also extended by equity to persons selling reversionary interests, who are not heirs, although certainly the same reasons do not occur in support of it(i).

And although the bargain include property in possession, yet if the bulk of the property is reversionary, the whole contract will be set aside (k)(179).

(g) Gowland v. De Faria, 17 Ves. jun. 20.

(h) Gowland v. De Faria, ubi sup; Evans v. Griffith, Farmer v. Wardell, 17 Ves. jun. 24. cited; Medlicott v. O'Donel, 1 Ball & Beatty, 136; Kendall v. Beckett, 2 Russ. & Myl. 88.

(i) Wiseman v. Beake, 2 Vern. 121; Cole v. Gibbons, 3 P. Wms. 290.

(k) Lord Portmore v. Taylor, 4 Sim. 182.

deed made in the life-time of the father, yet the covenant to make further assurances may be valid, if made on good consideration, without undue advantage or oppression taken of the heir, and with the knowledge and consent of the father."

(178) See Butler v. Haskell, 4 Des. 698.

In judging of inadequacy of price, reference is to be had to the time of the sale; "accidental subsequent advantage made of a bargain, is nothing." Osgood v. Franklin, 2 Johns. Ch. Rep. 26.

(179) A mortgage to secure against future liabilities, in the absence (\*265)

But a bona fide sale of a reversionary estate cannot be set aside, whether the vendor be an heir or not(l), unless fraud or imposition be expressly proved, or be implied from the inadequacy of the consideration, or other circumstances attending the sale(m), although in a late case it was deemed sufficient to avoid the contract(n), that the consideration was not equal to the calculated value in the tables. If the bill be delayed for a great length of time(o), or the vendor, with full notice of all the circumstances, and of his right to set aside the contract, confirm the purchase(p), equity will not relieve against the sale,

- (1) Dews v. Brandt, Sel. Ca. Cha. 8; and see 1 Bro. C. C. 6.
- (m) Nicols v. Gould, 2 Ves. 422; Gwynne v. Heaton, 1 Bro. C. C. 1; Peacock v. Evans, 16 Ves. jun. 512; Ryle v. Brown, 13 Price, 750; Lord Portmore v. Taylor, 4 Sim. 182.
- (n) Gowland v. De Faria, 17 Ves. jun. 20. The decision was appealed from, but the suit was compromised by Gowland (the seller) paying the costs and a sum of money to De Faria (the purchaser), beyond the sum decreed to him at the Rolls.
- (o) Moth v. Atwood, 5 Ves. jun. 845; but see Roche v. O'Brien, 1 Ball & Beatty, 330.
- (p) Cole v. Gibbons, 3 P. Wms. 290; Chesterfield v. Janssen, 1
  Atk. 301; 2 Ves. 549. See Baugh v. Price, 1 Wils. 320; Morse v.
  Royal, 12 Ves. jun. 355; Roche v. O'Brien, 1 Ball & Beatty, 330.

of fraud is valid. Thus in Hubbard v. Savage, 8 Conn. R. 215, where the condition of a mortgage deed was "that whereas A. has endorsed for B., a note for 1000 dollars and has agreed to indorse in note or notes, hereafter, when requested—if B. shall well and truly pay said notes according to their tenor, said deed is to be void." Afterwards C. a creditor of B. took security for his debt on the property so mortgaged; but the first mortgage was held to be valid. Daggett, J. In the absence of all fraudulent intention, I am unable to see how a deed given by a man indebted at the time, to secure against future liabilities can be deemed void. It was held valid in Stoughton v. Pasco, 5 Conn. R. 442; Crane v. Deming, 7 ib. 387. And the doctrine has been recognised in the U. S. C. not only as a security for debts to be contracted, as well as for that already due. United States v. Hor, 3 Cranch, 73, 89; 7 Ib. 34, 50.

although the aid of the Court could not originally have been withheld.

Where a sale is set aside on account of the inadequacy (\*)of the consideration, it is upon the principle of redemption, and the conveyance will stand as a security for the principal and interest, and even costs(q); but compound interest will not be allowed, however long the purchaser has been kept out of his money(r); in many cases, therefore, the seller is not merely relieved against the contract, but a considerable benefit is given to him at the expense of the purchaser. In a late case, where interest had been paid on the purchase-money, the payments, were considered to be of principal and not interest, and the seller was charged with interest on all the sums received by him, whether received as interest or as principal(s).

So the purchaser will be allowed for lasting and valuable improvements, and will not, like a mortgagee be charged with what without wilful default he might have made(t).

The rules on this head have a strong tendency to stop altogether the sale of reversions; but as this is not possible, they must necessarily have the effect of preventing the sale of reversions at their fair market value. It is perfectly well known that reversions upon sales even by auction, fetch on an average only two-thirds of the sum at which they are valued in the tables: according to the

<sup>(</sup>q) Twisleton v. Griffith, 1 P. Wms. 310; Gwynne v. Heaton, 1 Bro. C. C. 1; Peacock v. Evans, 16 Ves. jun. 512; Bowes v. Heaps, 3 Ves. & Bea. 117; but in Nicols v. Gould, 2 Ves. 423, Lord Hardwicke thought he could not set aside the purchaser without making the purchaser pay costs; and see Baugh v. Price, 1 Wils. 320; Gowland v. De Faria, 17 Ves. jun. 20; Morony v. O'Dea, 1 Ball & Beatty, 109, and the Reporter's note; and Wood v. Abrey, 3 Madd. 417.

<sup>(</sup>r) Gowland v. De Faria, 17 Ves. jun. 20.

<sup>(</sup>s) Murray v. Palmer, 2 Scho. & Lef. 474.

<sup>(</sup>t) S. C.

late case of Gowland v. De Faria(u), this does not seem (\*)to operate in a purchaser's favor, although the value of a thing is at last not to be regulated by calculation, but as it is vulgarly termed, by what it will fetch. Experience has shown, that under the most favorable circumstances, reversions will not fetch their calculated value, which only allows the purchaser five per cent. interest, notwithstanding that his money may be locked up for many years. It seems therefore an equity not founded on reason or convenience, which in these cases inquires the calculated value of the subject of the contract instead of its value according to the well known market price. The effect of such an equity must ultimately be to injure the very persons in whose favor it was introduced. Reversions will never fetch their calculated value. Fair purchasers will not dare to purchase them at their market price, and consequently they will be thrown into the grasp of usurers, who will give very inadequate considerations for them, running the risk of a suit, in which event they will stand in as good a situation as if they had given the fair market price for them.

In a recent case(x) Chief Baron Alexander refused to set aside a private sale of a reversionary interest, although Mr. Morgan the actuary's valuation was 928l. 8s., and the price paid was only 630l., rather more than two-thirds of the calculated value. The learned Judge could not bring himself to adopt the principle laid down in Gowland v. De Faria. He observed, that in the case before him the price agreed on and actually paid was in his opinion the utmost that, according to every human probability, could have been obtained. He did not dispute Mr. Mor-

<sup>(</sup>u) Supra, p. 265, and note. See Exparte Thistlewood, 1 Rose, 290; Lord Portmore v. Taylor, 4 Sim. 182; Whichcote v. Bramston, ib. 202, n.

<sup>(</sup>x) Headen v. Rosher, 1 M'Clel. & You. 89; but Hincksman v. Smith, 3 Russ. 433; Hilliard v. Gambel, 1 Toml. 375, n. (\*267)

gan's valuation, but the price put by the actuary can never be procured in fact; the witnesses for the defendant (\*)prove it, and it requires no witnesses. The price set was the arithmetical value. Now no man will part with his ready money, and all the advantages which the power over it confers, in exchange for a future interest, without some compensation beyond the dry arithmetical value of it. To set this bargain aside would be in effect to decree that no valid bargain for a reversion can be made except by auction; and he did not know how any other sale of such an interest could be sustained, unless Judges proceeded on the same principle as he did. This would be a very inconvenient restraint on the power of the owners of such property. A private sale is no doubt, sometimes, an imprudent exercise of that power; but in many situations, and under circumstances of no unfrequent occurrence, it is wise and provident. Every case should turn on its particular circumstances; and he thought there were none in the present case which, either according to sound sense, or to any established course of precedents, affected it.

In the case of Potts v. Curtis(y), the bill was to compel a transfer of some stock, the reversion of which had been purchased by private contract by the plaintiff. The purchase was made in 1812 for 550l. The claim was resisted upon the allegation of undue advantage, which was abandoned, and inadequacy of consideration. The plaintiff examined two auctioneers to prove the value. The defendant examined two actuaries, an auctioneer, and a land agent; and in the result the purchaser was supported. This case, for the first time, fairly introduced the question between the conflicting evidence of auctioneers and actuaries, or, in other words, between the market price of reversions, and their estimated value according to the tables. Lord Lynd-

hurst observed, that he had made a calculation as to the (\*)inadequacy. If the two calculations of Morgan and Ansell, the actuaries, and the average of their results be taken on the one side, and the calculations of the two witnesses for the plaintiff, and the average of their results be stated on the other side, and then the average of the whole, two on one side, and two on the other, be taken, the result is 597l., that is, 47l. more than the price actually paid. There are valuations on the one side, making it 530l. and 500l., adding them together, the sum is 1,030l., which divided by two, makes the average 515l., from which one-eighth being taken, in consequence of a mistake, reduces it to 450l. Then, on the other side, taking the valuation of Morgan at 855l., and of Ansell at 847l., they make together 1,702l., which divided by two, makes the average 851l., taking one-eighth from which, reduces it to 744l.; so that the average on one side, after taking off the eighth, is 744l., and the average on the other side, after deducting the eighth, is 450l. Now, adding the 744l. to the 450l., they make together 1,194l., and this being divided by two, makes 597l., as the average of the whole, which is just 47l. more than the price actually paid. It was quite clear that Sir William Grant, in Gowland v. De Faria, paused a moment as to an actuary's valuation; but then, he says, "there is nothing opposed to it; it is not questioned, but it is admitted." He (Lord Lyndhurst) took that as the basis upon which he should proceed. It was equally clear, he seemed to think, a question might arise as to whether an actuary's valuation was the real value. Sir William Alexander in Headon v. Rosher, states that the sum at which an actuary values a reversion never can be obtained. He (Lord Lyndhurst) supposed it could not; for why should a party choose to lock up his money at the ordinary interest? Some deduction therefore should be made on that account; but in this case, making no deduction, and taking the valua-(\*269)

tions (\*) on both sides, the average is only 47l. more than the money paid for the reversion. It was unnecessary for him to say what was the extent of the inadequacy of consideration which would vitiate a contract of this kind, for it did not appear to him that the consideration was inadequate when the subject was fairly considered. Undoubtedly in this case, Mr. Morgan and Mr. Ansell, who were both actuaries, and accustomed to make calculations of this description with great accuracy, stated that they calculated the value of this reversion at considerably more than the sum that was agreed to be paid for it. This brought him (Lord Lyndhurst) to the consideration of the doctrine in Gowland v. De Faria. What is it the Master of the Rolls there says? He says, "The question is, whether he has received an adequate consideration. Upon that question, the evidence is all one way. In many of these cases very opposite opinions are given by calculators; but here Mr. Morgan's opinion is not contradicted; I must therefore take the value to be inadequate; and I do not see how I can avoid setting aside the contract." In that case there was a calculated value; that value was stated by Mr. Morgan; and the Master of the Rolls not finding that calculated value opposed by any evidence, considered he was bound by it; and the calculated value being much more than the sum paid, he considered the contract was altogether void. But he (Lord Lyndhurst) thought the observations made upon that case by Sir William Alexander, very judicious and very proper. He says, "Calculated value is never actual value, and no person selling a reversionary interest can ever expect to get the calculated value." And his reason is extremely good and satisfactory. He says, "The price agreed on and actually paid, was in my opinion the utmost that, according to human probability, could have been obtained. I do not dispute Mr. Morgan's valuation; but the price (\*)of an actuary cannot be obtained. The price set was (\$270) (\*271)

an arithmetical value. Now no man will part with his ready money, and all the advantages which the power over it confers, in exchange for a future interest, without some compensation beyond the dry arithmetical value of it." Sir William Alexander, therefore, would have come to the conclusion probably in Gowland v. De Faria, that according to his experience, he would not have been bound, as the Master of the Rolls conceived himself to be, by the evidence of the calculated value. The Master of the Rolls thought that the calculated value being opposed by no other evidence, was conclusive upon him. According to his (Lord Lyndhurst's) understanding of the judgment of Sir William Alexander, he would not have considered himself so bound; he would have exercised his own understanding and experience, and made certain deductions from the calculated value; but in the present case they have evidence not merely of the calculated value, but evidence independent of it. Now the evidence of the calculated value of the two most experienced witnesses on the part of the defendant, those on whose judgment he should be disposed most to rely, Mr. Morgan and Mr. Ansell, was, that the calculated value amounted to 744l. When he said 744l., that is the average of their valuation, after deducting one-eighth in consequence of their calculation having originally included 2,000l., which it turned out should have been omitted. Their estimated value, therefore, is 744l.; two thirds of that sum is 496l. only. If you deduct, according to common experience, a third from the calculated value, the proportion to which as the average price obtained(z), it would reduce the 744l. to 496l., whereas the sum here contracted for amounted to 550l. But what (\*) was the evidence on the other side? The evidence on the other side, of Mr. Fairbrother, was, that it was not

<sup>(</sup>z) Sug. Vend. & Purch. 239.

worth to sell more than 530l.: the evidence of Mr. Abbott, that it was not worth more than 500l. Taking therefore the evidence of Mr. Fairbrother, and the evidence of Mr. Abbott, who were both experienced persons in selling property of this description, and contrasting that with the calculated value, the estimate they put upon the property was something more than two-thirds of the calculated value, and something less than the money actually given for the property. There was another way of considering it, which he had already presented to the parties: he would take Mr. Morgan and Mr. Ansell on one side, and take their average, and then Fairbrother and Abbott on the other side, and take their average, and then taking the average of the two sets of calculators, he found the estimated value upon that average was only 597l., which was only 47l. more than the sum actually contracted to be paid.

In a late case(a), Sir John Leach held that the rule did not extend to sales by auction. His Honor said, that the principle of the rule could not be applied to sales of reversion by auction. There being no treaty between vendor and purchaser, there can be no opportunity for fraud or imposition on the part of the purchaser. The sale by auction is evidence of the market price. It was said, that pretended sales by auction may be used to cover private bargains; where such cases occur they will operate nothing.

So the same Judge held, that the rule did not apply to a sale by a father, tenant for life, and his son tenant in tail in remainder, for they form a vendor with a present (\*)interest, and meet a purchaser with the same advantages as if a single person had the whole power over the estate(b).

<sup>(</sup>a) Shelly v. Nash, 3 Madd. 232. See Fox v. Wright, 6 Madd. 111.

<sup>(</sup>b) Wood v. Abrey, 3 Madd. 417.

In Baker v. Bent(c), where the bill was filed to set aside for undervalue a sale of a reversion expectant upon the death of a tenant for life without issue male, and subject to charges in other events, the Master of the Rolls said, that the probability that a testator of sixtythree will marry and have issue, depending upon the habits and disposition of the party, and the accidents of life, is not the subject of estimate or calculation, and he put out of his consideration all evidence which affected to set a value on that contingency. But as, in the case before him, the purchaser at the beginning of the treaty was not aware that such a contingency existed, and he put a value upon the plaintiff's interest, as if the reversion were actually to take effect upon the death of the tenant for life; and when he afterwards discovered the contingency he proposed to deduct one half of the sum he had just offered, and that proposal was ultimately the basis of the agreement; the learned Judge referred it to the Master to inquire, what was the value of the reversion, supposing it had been to take effect certainly at the death of the tenant for life, and by declaring that one half of such value is to be deducted in respect of the contingency.

It must not, however, be understood, that because there is a contingency which is not strictly the subject of valuation, a purchaser can sustain a purchase at an undervalue.

It must be remarked, that we have no certain rule by (\*)which the inadequacy of a consideration can be ascertained. Our law, indeed, hath in one instance(d) adopted the rule of the civil law; by which no consideration for an estate was deemed inadequate which exceeded

<sup>(</sup>c) 1 Russ. & Myl. 224; see Sherwood v. Robins, 1 Mood. & Malk. 194.

<sup>(</sup>d) Vide Duke, 177: et infra, ch. 16; and see Baldwin v. Rochfort, 2 Ves. 517, cited.

half the real value of the estate; and Lord Nottingham wished the rule universally prevailed in England(e).

If it be agreed, that the price of an estate shall be fixed by a third person, and such person accordingly name the sum to be paid for the estate, equity will compel a performance in specie; but if the referee do not act fairly, or a valuation be not carefully made, execution of the contract will not be compelled; especially if there be any other ground upon which the Court can fasten, as a bar to its aid(f).

By the civil law, also, a price was considered sufficiently certain, if it was to be fixed by a person named, and such person accordingly fixed the sum: but it appears by the Institutes(g), "Inter veteres satis abundaque hoc dubitatur, constaretne venditio, an non."

Such arbitrators may take the opinion of a third person as evidence, but they cannot merely delegate their authority (h).

If an agreement be made to sell at a fair valuation, the Court will execute it although the value is not fixed. For as no particular means of ascertaining the value are pointed out, there is nothing to preclude the Court from adopting any means adapted to that purpose(i).

(\*)But where parties agree upon a specific mode of valuation, as by two persons, one chosen by each, unless the price is fixed in the way pointed out, the Court cannot enforce the performance of the agreement, for that would

<sup>(</sup>e) See Nott v. Hill, 2 Cha. Ca. 120; 1 Treat. Eq. 119; Grotius de jure Belli ac Pacis, L. 2, c. 12, s. 12.

<sup>(</sup>f) Emery v. Wase, 5 Ves. jun. 346; 8 Ves. jun. 505; Hall v. Warren, 9 Ves. jun. 605.

<sup>(</sup>g) III. xxiv. 1. For the cases arising out of this rule, vide Vinnius, 674.

<sup>(</sup>h) Hopcraft v. Hickman, 2 Sim. & Stu. 130.

<sup>(</sup>i) See 14 Ves. jun. 407.

be not to execute their agreement, but to make a new one for them. Therefore, where the agreement was to sell at a valuation by arbitrators, to be appointed, or their umpire, and arbitrators were appointed, and differed as to value, and could not agree upon an umpire, the Court refused to interfere (k).

In this respect our law accords with the civil law(l). The same rule is adopted in the Code Napoleon(m). After stating that the price ought to be fixed by the parties, it adds, "Il peut cependant être laissé à l'arbitrage d'un tiers: si le tiers ne veut ou ne peut faire l'estimation, il n'y a point de vente."

If therefore the medium of arbitration or umpirage is resorted to for settling the terms of a contract, and fails, equity has no jurisdiction to determine that though there is no contract at law, there is a contract in equity:—If the instrument assume that the award shall bind the parties personally, the death of one of them before the award will of course be a countermand of the submission at law, and equity cannot enforce the contract(n). So if the arbitrators are named, and one party refuses to execute the arbitration bond, as it is not certain that any award will ever be made, equity will not interfere; for the relief sought is a specific performance by the defendant conveying (\*)at such price as the arbitrators named shall hereafter fix, and no award may ever be made(o)(I).

This proves that neither of the parties to such an agree-

<sup>(</sup>k) Milnes v. Gery, 14 Ves. jun. 400; Gregory v. Mighell, 18 Ves. jun. 328; Gourlay v. Duke of Somerset, 19 Ves. jun. 429. See Cooth v. Jackson, 6 Ves. jun. 34; Pritchard v. Ovey, 1 Jac. & Walk. 396.

<sup>(</sup>l) Vide supra.

<sup>(</sup>m) Code Civil, Liv. 3, Tit. 6, ch. 1, s. 1592.

<sup>(</sup>n) Blundell v. Brettargh, 17 Ves. jun. 232; and see 6 Ves. jun. 34.

<sup>(</sup>o) Wilks v. Davis, 3 Mer. 507.

<sup>(</sup>I) For the new powers given to arbitrators appointed by rule of Court, or the like, see 3 & 4 W. 4, c. 42, s. 39, 40, 41.

<sup>(\*276)</sup> 

ment can be compelled to nominate an arbitrator under the agreement. The very point was decided in the late case of Agar v. Macklew(p). A covenant was contained in a lease that the lessees might purchase the reversion at a valuation by two persons, one to be named by the lessor, and the other by the lessees, who were to name an umpire. The lessor refused to name an arbitrator, and upon demurrer it was held that the lessees could not file a bill for a specific performance, or to compel the lessor to nominate an arbitrator. But a party may bind himself by acquiescing in an award not made in the manner required(q). And in a case where the contract of sale was for twenty-five years purchase, on an annual value to be fixed by a certain day, by referees named, and the seller prevented the valuation from being made, it was held that he should not be allowed to avail himself of his own wrong. The Court would compel him to permit the valuation to be made according to the contract(r).

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## (\*) SECTION II.

Of the failure of the Consideration before the Conveyance.

I. A Vendee, being equitable owner of the estate from the time of the contract for sale, must pay the consideration for it, although the estate itself be destroyed between the agreement and the conveyance; and on the other

<sup>(</sup>p) V. C. 9 Nov. 1825, MS.; 2 Sim. & Stu. 154, S. C.

<sup>(</sup>q) See 17 Ves. jun. 241.

<sup>(</sup>r) Morse v. Merest, 6 Madd. 26.

hand, he will be entitled to any benefit which may accrue to the estate in the interim(s).

Nevertheless this doctrine, however it may seem to flow from the rules mentioned in the preceding chapter, has never been decided till lately.

For in Stent v. Baily (t), the Master of the Rolls said, "If I should buy a house, and before such time as by the articles I am to pay for the same the house be burnt down by casualty of fire, I shall not in equity be bound for the house (u)."

So upon a sale of a leasehold for lives (x), previously to the conveyance, one of the lives dropped; and although Lord Keeper Wright decreed a specific performance, yet the report states, that he seemed to think, that if all the lives had been dropped before the conveyance, it might have been another consideration, for that the money was to be paid for the conveyance, and no estate being left, there could be no conveyance.

The case of Cass v. Rudele, as it is reported in Vernon(y), is an authority against the dictum of the Master (\*)of the Rolls, in Stent v. Baily; but it appears(z) that the case is mis-stated in Vernon, and that the decree was founded on a good title having been conveyed.

In a late case(a), however, where A had contracted for the purchase of some houses which were burned down before the conveyance, the loss was holden to fall upon

- (s) See 2 Pow. on Contracts, 61.
- (t) 2 P. Wms. 220.
- (u) As to accidents before the contracts, unknown to the parties, see p. 254.
  - (x) White v. Nutt, 1 P. Wms. 62.
  - (y) 2 Vern. 280.
  - (z) See 1 Bro. C. C. 157, n.; and the note to Raith. edit. of Vernon.
- (a) Paine v. Meller, 6 Ves. jun. 349; and see Poole v. Shergold, 2 Bro. C. C. 118; Revel v. Hussey, 2 Ball. & Beatt. 280; Harford v. Purrier, 1 Madd. 532.

him, although the houses were insured at the time of the agreement for sale, and the vendor permitted the insurance to expire without giving notice to the vendee; Lord Eldon being of opinion, that no solid objection could be founded on the mere effect of the accident; because, as the party by the contract became in equity the owner of the premises, they were his to all intents and purposes(I). This decision proceeded on the only principle upon which it can be supported—that the purchaser was in equity owner of the estate. And therefore, in a case where a similar accident happened to an estate sold before a Master, and the report had only been confirmed nisi, the loss was holden to fall on the vendor(b): nor does the rule extend to evidence of the title to the property(c).

(\*) Lord Eldon's decision in Paine v. Meller, exactly accords with the doctrine of the civil law. Indeed this very case is put in the Institutes(d). "Cum autem emptio et venditio contracta sit, periculum rei venditæ statim ad emptorem pertinet, tametsi adhuc ea res emptori tradita non sit. Itaque si—aut ædes totæ, vel aliqua ex parte,

<sup>(</sup>b) Ex parte Minor, 11 Ves. jun. 559. Vide p. 60. See Zagury v. Furnell, 2 Camp. 240.

<sup>(</sup>c) Bryant v. Busk, 4 Russ. 1.

<sup>(</sup>d) III. xxiv. 3. Read Puff. de Jure Natura et Gentium, 1. 5, c. 5, s. 3.

<sup>(</sup>I) In the 2d vol. of Coll. of Decis. p. 56, are the two following cases:—The peril of a house sold, and thereafter burnt, was found to be the buyer's, though the disposition bore an obligement to put the buyer in possession, because the buyer did voluntarily take possession and rebuild the house, and likewise was enfeoffed before the burning. Hunter v. Wilsons.—A house bought being burnt, the Lords found, that the property being transferred to the buyer, by his being enfeoffed, and the keys being offered to him, the accidental loss must follow the buyer, although there was a part of the price unpaid, there being a difference about it, which was referred to some friends to be determined, and which they had not done when the burning happened. Atchison v. Dickson.

incendio consumptæ fuerint—emptoris damnum est, cui necesse est, licet rem non fuerit nactus, pretium solvere."

It is hardly necessary to remark, that although the Court will enforce a specific performance, notwithstanding that the estate is destroyed, yet this will not be done unless the title be good, or the purchaser has, previously to the accident, waved any objections to it.

The case of Paine v. Meller may be considered as having also settled, that a purchaser would be entitled to any benefit accruing to the estate after the agreement, and before the conveyance; for Lord Eldon said, "If a man had signed a contract for a house upon that land which is now appropriated to the London Docks, and that house was burnt, it would be impossible to say to the purchaser, willing to take the land without the house, because much more valuable on account of this project, that he should not have it."

This also appears to have been admitted in a case(e) where a man contracted for the purchase of a reversion, and afterwards the lives dropped before the contract was carried into execution; for, although the Court did not decree a specific performance, they proceeded entirely on the laches and trifling conduct of the purchaser, and never even hinted that the contract should not be performed on account of the lives having dropped.

Indeed this point flows from the decision in Paine v. (\*)Meller; and it was the rule of the civil law, that the purchaser should benefit by the accretion to the estate before the conveyance: nam et commodum ejus esse debet cujus periculum est(f).

These cases suggest the observation that, in agreements for the purchase of houses, some provision should be made for their insurance until the completion of the contract.

 <sup>(</sup>e) Spurrier v. Hancock, 4 Ves. jun. 667; and see P. Wms. 62.
 (f) Inst. ubi sup.
 (\*280)

II. It equally follows, from the general rule of equity, by which that which is agreed to be done is considered as actually performed, that if a person agree to give a contingent consideration for an estate, as an annuity for the life of the vendor, and the vendor die before the conveyance is executed, by which event the annuity ceases, yet the purchaser will be entitled to a specific performance of his contract. This, we observe, is a much stronger case than that before discussed. There a loss was actually sustained, and the only question was, upon whom it should fall. But in this case, if performance of the agreement were not compelled, the parties would stand in precisely the same situation as before the contract; whereas, by performing the agreement, the estate is given to the purchaser, without his paying any consideration for it. A steady adherence to principle compels the Court to overlook the hardship of this particular case, and the doctrine rests upon high authority.

Thus in the case of Mortimer v. Capper(g), A. contracted to sell an estate to B. for 200l. and 50l. a year annuity; and two days after the contract was reduced into writing, A. was found drowned: the Lord Chancellor directed an inquiry as to the value of an annuity for the life of A., in order to introduce the question, whether an estate (\*)being disposed of for an annuity, which is a contingency, the contract shall fall to the ground, if no payment of the annuity shall be made. He said, that he thought, if the price were fair, the contract ought not to be cut down, merely because the annuity, which was a contingent payment, never became payable.

The parties in the above cause were so well satisfied with the opinion of the Court, that they never, it is said, brought it back for further directions (h).

<sup>(</sup>g) 1 Bro. C. C. 156. See Wyvill v. Bishop of Exeter, 1 Price, 292.

<sup>(</sup>h) See 3 Bro. C. C. 609, sed qu.

So in a later case(i), where A. sold an estate by auction, in consideration of a life annuity(1), the first payment to be made on the 25th of December 1787; but in case he should die before the 29th of September 1787, up to which time he was to receive the rents, the contract should be void. A. died on the 1st of February 1788, after a sudden and short illness of only two days; and owing to some delays, the conveyances were not executed. The quarter's payment, due at Christmas, was tendered to the vendor's agent by the purchaser, a few days after it became due; but the agent declined receiving it, saying, that the conveyance would be soon completed, and that it was not necessary for the purchaser to make such payment in the mean time. On the first hearing, Lord Thurlow said, he did not see that if an annuity was contracted for why the consideration should not be paid. It was, he said, objected, that the contract could not be carried into execution modo et forma, and that had great weight where there had been no payment. His Lordship afterwards made his decree for a specific performance, on payment of the arrears of the annuity, the consideration for the purchase of the estate.

(\*) The case of Paine v. Meller bears on this point also. Lord Eldon, in delivering judgment, said, that as to the annuity cases, and all others, the true answer had been given; that the party has the thing he bought, though no payment may have been made; for he bought subject to contingency; and in the later case of Coles v. Trecothick, his Lordship expressed the same opinion(k).

But if in a case of this nature, a payment of the annuity become due before the death of the vendor, and the pur-

<sup>(</sup>i) Jackson v. Lever, 3 Bro. C. C. 605.

<sup>(</sup>k) See 9 Ves. jun. 246.

<sup>(</sup>I) See Appendix, No. 13, for a statement of the new Annuity Act. (\*282)

chaser neglect to make or tender it, he cannot insist upon a specific performance.

This was decided by the case of Pope v. Root(l). A. contracted with B. for the sale of an estate to him, in consideration of a life annuity, and the completion of the agreement was delayed by the illness of a mortgagee, who was to have been paid off. Two days after the time mentioned for completing the purchase, A. met with an accident, and died within a few days. By the terms of the contract, the first payment of the annuity became due previously to the death of A., but it was not paid or tendered. And Lord Chancellor Bathurst dismissed the bill for a specific performance, and the decree was affirmed in the House of Lords(m), (I).

The reader will observe, that the decisions in the cases of Mortimer v. Capper and Jackson v. Lever, do not infringe upon that of the House of Lords, in the prior case of Pope v. Root, but reduce the rules on this subject to an equitable and uniform standard; for the only case in (\*)which a purchaser cannot require the assistance of equity, is where he has by laches forfeited his right to its aid, namely, where a payment of the annuity became due, and he neglected to pay or tender it.

To obviate all doubt, it seems advisable in agreements for purchase, where the consideration is an annuity for the life of the vendor, to expressly declare, that the death of the vendor, previously to the completion of the contract, shall not put an end to it, although a payment of the annuity shall not have become due, or having become due,

<sup>(1) 7</sup> Bro. P. C. 184.

<sup>(</sup>m) See Lord Bathurst's decision in Baldwin v. Boulter, 1 Bro. C. C. 156, cited.

<sup>(</sup>I) One writer thought, that the inadequacy of the consideration influenced this decision; see 2 Pow. on Contracts, 76; but it does not appear that any inadequacy was actually proved.

shall not have been made or tendered; but that, on the contrary, the purchaser shall be entitled to a conveyance, on payment of the annuity up to the death of the vendor.

In the cases just dismissed, the purchaser, by the death of the vendor, obtained the estate without paying any, or only a nominal consideration for it. Perhaps a case may arise where the vendor having received the purchasemoney, may, by the death of the purchaser, be entitled to retain the estate also, although he may not be his heir. This case was put in the argument of Burgess v. Wheate(n): a purchase, and the money paid by the purchaser, who dies without heir, before any conveyance. It was said, if the lord could not claim the estate, and pray a conveyance, the vendor would hold the estate he has been paid for, and keep the money too. Sir Thomas Clarke, in delivering his opinion, said, that he thought the lord could not pray the conveyance; to say he could was begging the question. And as to the vendor's keeping both the estate and the money, it was analogous to what equity does in another case; as where a conveyance is made (\*) prematurely, before money paid, the money is considered as a lien on that estate in the hands of the vendee. So where money was paid prematurely, the money would be considered as a lien on the estate in the hands of the vendor, for the personal representatives of the purchaser; which would leave things in statu quo.

It may be doubted, however, whether this case, if it should ever arise, would be decided according to Sir Thomas Clarke's opinion. Where a lien is raised for purchase-money under the usual equity(o), in favor of a vendor, it is for a debt really due to him, and equity merely provides a security for it. But in the case under

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<sup>(</sup>n) 1 Blackst. 123.

<sup>(</sup>o) Vide infra, ch. 12.

consideration, equity must not simply give a security for an existing debt; it must first raise a debt against the express agreement of the parties. The purchase-money was a debt due to the vendor, which upon principle it would be difficult to make him repay. What power has a court of equity to rescind a legal contract like this? The question might perhaps arise if the vendor was seeking relief in equity, but in this case he must be a defendant. If it should be admitted that the money cannot be recovered, then of course he must retain the estate also, until some person appear who is by law entitled to require a conveyance of it.

It has been decided that a specific performance will be decreed of a contract for sale of a life annuity, although the annuitant be dead before the bill be filed, provided the contract was a continuing one at his death (p). This is the converse of the point decided in Mortimer v. Capper, and that line of cases. The Vice-Chancellor (Sir John Leach) observed, that it may now be considered as (\*)the settled law of the court, by the cases of Mortimer v. Capper, and Jackson v. Lever, and the reported dicta of Lord Eldon, especially in the case of Coles v. Trecothick, that if the price of property be an annuity for the life of the vendor, his death before the conveyance will form no objection to the specific performance of the contract. The vendor agrees to sell for a contingent price, and those who represent him cannot complain that the contingency has turned out unfavorably. The same principle necessarily applies to a case where the life annuity is not the price, but is the subject of the sale. If the annuitant happens to die before the annuity is legally transferred to the purchaser, the death of the annuitant can form no objection to the specific performance of the contract.

<sup>(</sup>p) Kennedy v. Wenham, 6 Madd. 355.

The purchaser agrees to buy an interest of uncertain duration, and he cannot complain that the contingency is unfavorable to him.

In the above case, the purchaser was entitled to arrears of the annuity, but the annuity was charged on the purchaser's own estate. It was argued that by the death of the annuitant, a legal transfer of the annuity was no longer necessary to the purchaser, and the only act to be done was the payment of a sum of money by him to the seller, and that the seller ought therefore to have proceeded at law and not in equity. The Vice-Chancellor said, that a court of equity entertains a suit for specific performance by a purchaser, in order to give him the very subject of his contract; and although the demand of a vendor be merely for a sum of money, it will entertain a similar suit for him, upon the principle that the remedies ought to be mutual. If the death of a life-annuitant were to happen at such a time that a purchaser in effect took no benefit under his contract, which might well happen where his title was to commence at a future time, there it might be (\*) made a question whether, as at the time of the bill filed a purchaser could file no bill in equity, the principle of mutual remedy could enable the vendor to file such a bill. But that is not this case; here the purchaser has an equitable title to the arrears of the annuity between the time of his purchase and the death of the annuitant, which would in principle now support a bill on his part for specific performance, although the facts of the case would not make such a bill advantageous to him. He considered this case, therefore, strictly a case of mutual remedy, so as to entitle the vendor to file a bill for specific performance; and it appeared to him to make no difference in principle that the annuity being charged upon the estate of the purchaser himself, he could prac-(\*286)

tically satisfy his demand for arrears, by retainer, without the necessity of a legal grant (180).

(180) Where Jones agreed to attend the sale of Hubbard's land, which was to be sold; and if it should be struck off to him, that he would convey the land to the latter upon the payment of the money within twelve months. He became the purchaser; but before the expiration of the 12 months Hubbard died. The Court rescinded the contract upon making a just compensation, which was the principal and interest. Jones v. Hubbard, 6 Munf. R. 251.

# (\*)CHAPTER VI.

OF THE PARTIAL EXECUTION OF A CONTRACT, WHERE A VENDOR HAS NOT THE INTEREST WHICH HE PRETENDED TO SELL; AND OF DEFECTS IN THE QUANTITY AND QUALITY OF THE ESTATE.

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#### SECTION I.

Where the Vendor has not the Interest which he sold.

- I. Where a person sells an interest, and it appears that the interest which he pretended to sell was not the true one; as, for example, it was for a less number of years than he had contracted to sell, the purchaser may consider the contract at an end, and bring an action for money had and received, to recover any sum of money which he may have paid in part performance of the agreement for the sale: and the vendor offering to make an allowance pro tanto, will make no difference; it is sufficient for the plaintiff to say, it is not the interest which I agreed to purchase (a)(181).
- (a) Farrer v. Nightingale, 2 Esp. Ca. 639; and see Hearn v. Tomlin, Peake's Ca. 192; Thomson v. Miles, 1 Esp. Ca. 184; Mattock v. Hunt, B. R. 15 Feb. 1806; Hibbert v. Shee, 1 Campb. Ca. 113. See also Duffel v. Wilson, ib. 401; and see ch. 8, infra.

<sup>(181)</sup> See Weaver v. Bentley, 1 Caines' Rep. 47.; wherein it was held, that the purchaser might maintain assumpsit to recover back the purchase money, although the contract was under seal. See also, (\*287)

But in a late case(b) at nisi prius, where the agreement was to sell "the unexpired term of eight years' lease and good will," &c. and it appeared that, at the date of the agreement, the unexpired term in the lease was only seven years and seven months, Lord Ellenborough said, (\*) that the parties could not be supposed to have meant that there was the exact term of eight years unexpired, neither more nor less by a single day. The agreement must, therefore, receive a reasonable construction, and it seems not unreasonable that the period mentioned in the agreement should be calculated from the last preceding day when the rent was payable, and including, therefore, the current half year. Any fraud or material misdescription, though unintentional, would vacate the agreement, but the defendant might here have had substantially what he agreed to purchase.

Where a house was sold by auction, and no notice was taken of a fee-farm rent of 5s. 4d. charged upon that and upon other property, to a very great amount, the purchaser brought an action for breach of the agreement, and Sir Vicary Gibbs for the vendor, the defendant, declined arguing the point(c).

And where a particular described the subject of sale to be an annuity of so much, payable out of the tolls of Waterloo Bridge, the Court considered that the purchaser would make some inquiry as to the annuity; but as the Bridge Act did not speak of any power to redeem the annuities to be granted, and the annuity was made subject

<sup>(</sup>b) Belworth v. Hapell, 4 Camp. Ca. 140.

<sup>(</sup>c) Turner v. Beaurain, Sitt. Guildh. cor. Lord Ellenborough, C. J.2d June 1806; and see Barnwell v. Harris, 1 Taunt. 430.

D'Utricht v. Melchor, 1 Dall. 428. Gillet v. Maynard, 5 Johns. Rep. 85. Judson v. Wass, 11 Johns. Rep. 527. Raymond v. Bearnard, 12 Johns. Rep. 274. Putnam v. Westcot, 19 Johns. Rep. 73. Lyon v. Annable, 4 Conn. Rep. 350. Howes v. Barker, 3 Johns. Rep. 506.

to redemption, it was held that the contract was not binding on the purchaser; and the Court was of opinon, that sellers should be strictly bound to disclose the real nature of the subject of the contract(d).

But, notwithstanding that the vendor has a different interest to what he pretended to sell, equity will, in some

cases, compel the purchaser to take it.

Thus, although the estate is charged with trifling incumbrances, which cannot be discharged, yet it seems that, (\*)under some circumstances, if a satisfactory indemnity can be given against them, equity will compel a specific performance(e)(I)(182). This, however, is evidently a jurisdiction which cannot be too cautiously exercised. In a late case, Lord Eldon said, that he did not apprehend that the Court could compel the purchaser to take an indemnity, or the vendor to give it(f)(183).

So, although the vendor may not be entitled to the estate for the number of years which he contracted to sell, yet, if the deficiency were not great, equity would certainly decree a performance of the contract at a proportiona-

ble price(g).

(d) Coverley v. Burrell, M. T. 1821. B. R. MS.

- (e) Howland v. Norris, 1 Cox, 59; Hasley v. Grant, Horniblow v. Shirley, 13 Ves. jun. 73, 81; see 2 Swanst. 223; and see Barnwell v. Harris, 1 Taunt. 430; see also Hays v. Bailey, stated in ch. 7. post. Wood v. Bernal, 19 Ves. 220.
  - (f) See 1 Ves. & Beam. 225.

(g) See Guest v. Homfray, 5 Ves. jun. 818; and see Hanger v.
Eyles, 21 Vin. Abr. (Λ), pl. 1; 2 Eq. Ca. Abr. 689; see also 10 Ves. jun. 306; 13 Ves. jun. 77.

(\*289)

<sup>(</sup>I) Although it seems evident that this equity would be enforced in a case, for instance, like Turner v. Beaurain, yet the cases referred to are not decisive authorities in favor it.

<sup>(182)</sup> See King v. Bardeau, 6 Johns. Ch. Rep. 38. Ten Broeck v. Livingston, 1 Johns. Cha. Rep. 357, 363.

<sup>(183)</sup> See Boyle v. Rowand, 3 Des. 555.

But if the number of years be considerably less than the vendor pretended to sell, equity, so far from interfering in his favor, will assist the purchaser in recovering any deposit which he may have paid.

Thus, in Long v. Fletcher(h), A. pretending he had a term of sixteen years to come, in a house, agreed to sell it to B., and B. paid 100l., part of the consideration money, down. B. entered, but finding that A. had only a term of six years in the house, brought his bill to have an account, his money refunded, and the bargain set aside; and accordingly B. was decreed to account for the profits, and the consideration money to be refunded, and B., upon his own account, to have tenant allowances made him.

So, if a purchaser contract for what is stated to be an (\*)original lease, and it turn out to be an under-lease for the whole term, wanting a few days, it should seem that equity would not compel the purchaser to perform the contract. It is impossible, from the nature of the thing, to make any compensation for the reversion outstanding, and yet it may become very valuable; and it is of great importance to a purchaser of a lease not to have any third person stand between him and the owner of the inheritance(i).

It frequently happens that a contract for a leasehold estate is not carried into execution at the time appointed, and the vendor continues in possession. The estate, of course, daily decreases in value, and a question constantly arises, whether the purchaser shall be compelled to pay the full price originally agreed to be given for the estate, or what arrangement shall be made between the parties.

In a modern case(j), where this point arose, the

<sup>(</sup>h) 2 Eq. Ca. Abr. 5. pl. 4.

<sup>(</sup>i) Vide infra, where an underlease will be enforced against a vendor under an agreement to assign, div. II.

<sup>(</sup>j) Dyer v. Hargrave, 10 Ves. jun. 505. See and consider King v. Wightman, 1 Anst. 80; Fenton v. Browne, 14 Ves. jun. 144.

Master of the Rolls said, the reasonable course which he should adopt, was, that for the time elapsed before the execution of the agreement, in consequence of the pendency of the suit, interest should be paid by the purchaser, and a rent should be set upon the premises in respect of the possession of the vendor.

This rule at once provides for the interest of both parties, and accords with the maxim of equity, by which that which is agreed to be done, is considered as actually performed. The purchase-money, from the time of the contract, belongs to the vendor, who is entitled to interest on it while it is retained by the purchaser. The estate from the same time belongs to the purchaser, who is entitled to a rent for it while it is occupied by the vendor.

(\*)In Cuthbert v. Baker(k), the quit rents of a manor were stated in the particulars of sale to be 2l. a year, and they amounted to only 30s. a year; but a performance in specie was decreed, and it was referred to the Master to ascertain what compensation should be allowed in respect of the deficiency.

And it has been held that quit rents are subjects of compensation, probably because they may be regarded as incidents of tenure (l).

Where an estate is sold by auction, or before a Master, in lots, and the vendor has not a title to all the lots sold, equity will compel the purchaser to take the lots to which a title can be made, if they are not complicated with the rest; and will allow him a compensation pro tanto.

Thus in Poole v. Shergold(m), a man became the purchaser of several lots of an estate, to two of which no title could be made. And upon the Master's report Lord

<sup>(</sup>k) Reg. Lib. A. 1790, fol. 442.

<sup>(1)</sup> Esdaile v. Stephenson, 1 Sim. & Stu. 122.

<sup>(</sup>m) 2 Bro. C. C. 118; 1 Cox, 273. See 6 Ves. jun. 676. (\*291)

Kenyon said, he must take it for granted, these two lots were not so complicated with the others, as to entitle the purchaser to resist the whole; and therefore decreed a specific performance *pro tanto* (184).

But if a title cannot be made to a lot which is complicated with the rest, the purchaser will not be compelled to accept the lots to which a title can be made.

Thus, in the same case, Lord Kenyon said, if a purchase was made of a mansion-house in one lot, and farms, &c. in others, and no title could be made to the lot containing the mansion-house, it would be a ground to rescind the whole contract.

Lord Kenyon seems afterwards to have gone a step (\*)farther, and to have been of opinion, that such a contract ought not in any case to be *enforced* against a purchaser.

For sitting in a court of law(n), he held, that the performance of a contract for the sale of some houses ought not to be compelled, as a title could not be made to all the houses bought; and this, notwithstanding they were sold in separate lots. He said, when a party purchases several lots of this description at an auction, it must be taken as an entire contract; that is, that the several lots are purchased with a view of making them a joint concern. The seller, therefore, shall not, in case of any defect in his title to one part, be allowed to abandon that part at his pleasure, and to hold the purchaser to his bargain for the residue. From such a doctrine much injustice might result, as the part to which a seller could not make a title might be so circumstanced, that without it the other parts would be of

## (n) Chambers v. Griffiths, 1 Esp. Ca. 149.

<sup>(184)</sup> See Van Eps v. Corporation of Schenectady, 12 Johns. Rep. 436. Stoddart v. Smith, 5 Binn. 355. Waters v. Travis, on appeal, 9 Johns. Rep. 450. Osborne v. Bremar, 1 Des. 486. See also, Hepburn v. Auld, 5 Cranch, 262. Greenwalt v. Born, 3 Yeates, 6.

little, perhaps of no value; or it might leave it in the power of the seller, or any other person who might come to the possession of such part, to deprive the purchaser of every degree of enjoyment or beneficial use of that part which he had purchased. He added, that a case under circumstances precisely similar to the present, had been decided before him, when Master of the Rolls. That, on that case coming before him, he had found that his predecessor there, Sir Thomas Sewell, had ruled contrary to the doctrine he was now delivering; but that he at the Rolls had overruled Sir Thomas Sewells' determination, with the general approbation of the bar.

And the Court of Exchequer appear to have been of the same opinion as Lord Kenyon. For in a case(o), where a person purchased several lots of an estate sold under a decree of the Court, and the biddings were afterwards opened as to one lot, the Court were of opinion, that (\*)he had an option to open the biddings as to the rest of the lots.

In a late case(p), in which most of the authorities on this head were cited, the cases of Chambers v. Griffiths and Boyer v. Blackwell were not noticed; but I learn that Lord Eldon afterwards mentioned from the bench that he had met with the case of Chambers v. Griffiths; and he desired it to be understood, that he was not of the same opinion as Lord Kenyon; and, in a still later case, Lord Eldon expressed an opinion, that Lord Kenyon's rule would not be followed unless it could be shown that there was an understanding that the purchaser was not to take any of the lots unless he could obtain them all(q).

The rules laid down in Poole v. Shergold must therefore still be considered the law of the Court. It is indeed re-

<sup>(</sup>o) Boyer v. Blackwell, 3 Anstr. 657.

<sup>(</sup>p) Drewe v. Hanson, 6 Ves. jun. 675.

<sup>(</sup>q) 16 July 1816, MS. See Lewin v. Guest, 1 Russ. 325. (\*293)

markable, that in Chambers v. Griffiths, Lord Kenyon should have overlooked his decision in Poole v. Shergold; more especially as it in a great measure obviated the objections which he made to a partial execution by a court of equity of a contract for purchase of several lots of an estate. The doctrine, however, could not apply to an action at law, because although the same man purchase several lots at an auction, yet a distinct contract arises upon each(r). Chambers v. Griffiths cannot therefore be maintained as an authority even for the legal rule(185).

Where an estate is sold in one lot, either by private contract, or public sale, and the vendor has not a title to the whole estate, he cannot enforce the contract at law(s),

- (r) Emmerson v. Heelis, 2 Taunt. 38; James v. Shore, 1 Stark. 426; see Baldey v. Parker, 2 Barn. & Cress. 37; 3 Dowl. & Ryl. 220. S. C.
  - (s) Tomkins v. White, 3 Smith, 435.

(185) See Hepburn v. Auld, ut supra. Osborne v. Bremar, 1 Des. 486. Van Eps v. Corporation of Schenectady, 12 Johns. Rep. 436, 443. and 3 Yeates, 8. Nor in equity. See Hepburn v. Auld, 5 Cranch, 262, 276. Butler v. O'Hear, 1 Des. 382.

In Croome v. Lediard, 2 M. & K. R. in Ch. 251, by a written agreement between plaintiff and desendant, the plaintiff agreed to sell and the defendant to purchase, upon the terms stated, the Leigh estate: and by the same agreement the defendant agreed to sell another estate called the Haresfield estate; and eventually the defendant was unable to make a good title to the latter estate: held, that the plaintiff was entitled to a specific performance of the latter contract. But evidence aliunde was not admitted to show that the agreement was to take effect on the basis of a mutual exchange. The Lord Chancellor considered the agreements as distinct and wholly independent of each other. This case was distinguished from other cases, such as Poole v. Shergold, Knatchbull v. Grueber, Dalby v. Pullen, Price v. Price, Cassamajor v. Strode; because there, the question was between a vendor and purchaser, in this c ase, each party was both buyer and seller. Where two estates are conter minous, or where there was a mixed use and enjoyment of the estates, as in the case of an easement by one party over the property of the other, the contract depending on such a mutuality of purchase and sale might well exist.

unless perhaps a separate value was put on different parts of the estate, in which case the contract in favor of justice (\*)may be considered distinct. At law neither a vendor can, on an entire contract, recover part of the purchase-money, where he cannot make a title to the whole estate sold; nor would a purchaser be suffered in a court of law to say, that he would retain all of which the title was good, and vacate the contract as to the rest: such questions being subjects only for a court of equity(t).

But if the part to which the seller has a title was the purchaser's principal object, or equally his object with the part to which a title cannot be made, and is itself an independent subject, and not likely to be injured by the other part, equity will compel the purchaser to take it at a proportionate price; and in these cases it will be referred to the Master, to inquire, "whether the part to which a title cannot be made, is material to the possession and enjoyment of the rest of the estate (u)."

Thus in a case(x) before Sir Thomas Sewell, a man who had contracted for the purchase of a house and wharf, was compelled to take the house, although he could not obtain the wharf; and it appeared that his object was to carry on his business at the wharf(I); which, Lord Kenyon said, was a determination contrary to all justice and reason(y).

(t) Johnson v. Johnson, 3 Bos. & Pull. 162.

<sup>(</sup>u) M'Queen v. Farquhar, 11 Ves. jun. 467; Reg. Lib. B. 1804. fol. 1095; Knatchbull v. Grueber, 1 Madd. 153; Bowyer v. Bright, 13 Price, 698.

<sup>(</sup>x) See 6 Ves. jun. 678; 7 Ves. jun. 270, cited; and see M'Queen v. Farquhar, 11 Ves. jun. 467.

<sup>(</sup>y) 1 Cox, 274.

This case has been frequently disapproved of, and would not have been so decided at this day. See 1 Esp. Ca. 152; 6 Ves. jun. 679;
 Ves. jun. 78. 228. 427. In Stewart v. Alliston, 1 Mer. 26, Lord Eldon expressed himself much more strongly against the principle of these cases, than appears by the report.

And in the late case of Drewe v. Hanson(z), which (\*)arose upon the sale of an estate, together with the valuable corn and hay tithes of the whole parish, it appeared, that the principal object of the purchaser was the corn tithes, and that half the hay tithe belonged to the vicar, and the other half was commuted for by a payment of 2l. per annum, the nature of which did not appear. Upon the facts, as they then appeared, Lord Eldon would not give judgment, but he seemed clearly of opinion that the hay tithe, if not of great extent or of such a nature as to prejudice the corn tithe, was a subject for compensation: but otherwise not, as the purchaser would not get the thing which was the principal object of his contract(a).

In a case(b) often cited, where a man had articled for the purchase of an estate tithe-free, but which afterwards appeared to be subject to tithes, Lord Thurlow, it was said, decreed a specific performance, although the purchaser proved, that his object was to buy an estate tithe-free. This, however, to use Lord Eldon's words(c), is a prodigious strong measure in a court of equity to say as a discreet exercise of its jurisdiction, that the contract shall be performed, the defendant swearing and positively proving that he would have had nothing to do with the estate if not tithe-free. But it now appears from the report of the case, published by Mr. Cox, that the estate was subject only to a money-payment of 14l.

<sup>(</sup>z) 6 Ves. jun. 675.

<sup>(</sup>a) See Vancouver v. Bliss, 11 Ves. jun. 458; Stapylton v. Scott, 13 Ves. jun. 425.

<sup>(</sup>b) Lord Stanhope's case, 6 Ves. jun. 678, cited; Lowndes v. Lane, 2 Cox, 363; 6 Ves. jun. 676, cited; but see Pincke v. Curteis, cited ibid.; and see Rose v. Calland, 5 Ves. jun. 186; Wallinger v. Hilbert, 1 Mer. 104.

<sup>(</sup>c) See 6 Ves. jun. 679; and see 17 Ves. jun. 280.

in lieu of tithes(d). And in the case of Ker v. Clobery(\*)(e), where the estate was sold before the Master, and the particulars stated, that "the whole of the above lands are only subject to a modus for tithe hay of 2l. per annum," Lord Eldon was of opinion, that a purchaser of an estate stated to be tithe-free, or subject to a modus, could not be compelled to take it with a compensation, if the estate is not tithe-free. His Lordship said, that he had so decided in a case from Yorkshire, in which he had told the purchaser, if he would take the estate with a compensation, he must undertake to pay the tithes to the vendor. The question therefore is now at rest(186).

Where an estate is sold tithe-free, the question whether tithe-free is not a question of title but of fact: if the sale was of lands and of tithes, then the matter of tithe would be matter of title (f).

In a late case, upon a sale before a Master, where the particular stated *about* thirty-three acres to be tithe-free, Lord Eldon held, that the principle laid down in Ker v. Clobery did not apply(g).

In a case, where the estate was described as let on a ground-lease at so much per annum, and it turned out that the lease was at rack-rent, Lord Eldon would not support the sale, although there was the usual clause, that errors or mis-statements should not annul the sale(h). So when the house was described as brick built, although

- (d) Howland v. Norris, 1 Cox, 59.
- (e) 26 Mar. 1814, MS.
- (f) Smith v. Lloyd, 2 Swanst. 224, n.
- (g) Binks v. Lord Rokeby, E. T. 1818. MS.; S. C. 2 Swanst. 222; and see Smith v. Tolcher, 4 Russ. 302.
  - (h) Stewart v. Alliston, 1 Mer. 26.

<sup>(186)</sup> See Waters v. Travis, 9 Johns. Rep. 450, 465. on appeal. Stoddart v. Smith, 5 Binn. 355. Greenwalt v. Born, 3 Yeates, 6. (\*296)

in part built of lath and plaster, and there was no party wall; the same result followed(i).

Where the particular described the estate as four hundred and twelve acres, two hundred and twenty-seven of (\*) which were tithe-free, paying a very small modus; and it appeared that part of the estate represented to be tithefree was subject to tithes which the owner was willing to sell, Lord Eldon said, that the allegation was, that two hundred and twenty-seven acres "are tithe-free, paying a very small modus," not stating a positive exemption from tithes; and where the contract is to sell an estate tithe-free, the vendor not representing himself to have title to the tithes, without entering into the question, whether the purchaser ought to be compelled to take it if not tithe-free; yet, if he chooses to take it, he cannot compel the vendor to buy the tithes, if there is a positive title to them in pernancy; all he can have is compensation(k)(187).

If a purchaser, with notice of a defect in a title to a part of the estate which is complicated with the rest, or which is the principal object of his contract, take possession of the estate, and prevent the vendor from making a title, he will be compelled to perform the contract, notwithstanding that he insisted upon the objection at the time he entered(l). A deduction from the price will, however, be allowed him, although the situation of the land will not perhaps be taken into consideration.

A purchaser will not be compelled to take an undivided part of the estate contracted for. Therefore, if a man contract with tenants in common for the purchase of their

<sup>(</sup>i) Powell v. Doubble, MS. supra, p. 42.

<sup>(</sup>k) Todd v. Gee, 17 Ves. jun. 273; qu. how is the compensation to be estimated? See Ker v. Clobery, supra.

<sup>(1)</sup> See Calcraft v. Roebuck, 1 Ves. jun. 221.

<sup>(187)</sup> See Wainwright v. Read, 1 Des. 573.

estate, and one of them die, the survivors cannot compel the purchaser to take their shares, unless he can obtain the share of the deceased.

And in a case where under a decree a person purchased two sevenths of an estate in one lot, and a good title was only made to one seventh, the purchaser was (\*)allowed to rescind the contract as to the whole of the lot(m).

Nor will a purchaser be compelled to take a leasehold estate, for however long a term it may be holden, where he has contracted for a freehold(I). Lord Alvanley expressed a clear opinion on this point(n); and it has since been expressly determined by Sir William Grant, in a case(o) where the vendor was entitled to a term of four thousand years, vested in a trustee for him, and also to a mortgage of the reversion in fee expectant upon the term which was vested in himself and forfeited, but not foreclosed. The person claiming under the mortgagor of the reversion refused to release, and thereupon the bill was dismissed.

Neither is a purchaser compellable to accept a copyhold estate in lieu of a freehold (p)(II).

- (m) Roffey v. Shallcross, 4 Madd. 227; Dalby v. Pullen, 3 Sim. 29.
- (n) See 2 Bro. C. C. 497; 1 Ves. jun. 226.
- (o) Drewe v. Corp, 9 Ves. jun. 368; Lib. Reg. 1803, fol. 290. The registrar's book appears to have been again referred to for this case, 1 Sim. & Stu. 201, n; and see 13 Ves. jun. 78.
- (p) See Twining v. Morrice, 2 Bro. C. C. 326; and Sir Harry Hick v. Phillips, Prec. Cha. 575.

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<sup>(</sup>I) As to making a title by a feoffment, and assigning the term to a trustee, see Saunders v. Lord Annesley, 2 Scho. & Lef. 73. Doe v. Lynes, 3 Barn & Cress. 388; 5 Dowl. & Ryl. 160, S. C.

<sup>(</sup>II) In the case of Sir Harry Hick v. Phillips, on account of the unreasonable price at which the estate was sold, a specific performance was refused, although the vendor offered to procure an enfranchisement of the copyholds. See 10 Mod. 504. But this case cannot be con-

But if an estate is sold as copyhold, and represented as equal in value to freehold, it seems that the vendor will be compelled to perform the contract, although the estate (\*)prove to be actually freehold(q). If, however, the contract for the sale of a supposed copyhold, stipulate that the sale shall be void if any part is freehold, the subject must be proved as described; and the circumstance of the seller himself, after the first contract, selling the estate to another as copyhold, is not conclusive evidence against him(r).

So it is said, that a purchaser of an existing lease is not bound to take a new lease instead of the old one, because the purchaser would become an original lessee, instead of an assignee; and might therefore be subject to burdens, to which he would not have been liable in the latter character(s).

It need hardly be observed, that if the estate be sold as in possession, the purchaser cannot be compelled to take it if it is subject to a lease for life(t), or indeed any lease.

If a vendee proceed in the treaty for purchase after he is acquainted with the nature of the tenure, and do not object to it, he will be bound to complete his contract, and cannot claim any compensation on account of the difference in value.

Thus, where an estate was sold as freehold, with a leasehold adjoining (u), and it turned out on examination

<sup>(</sup>q) Twining v. Morrice, 2 Bro. C. C. 326; and see Browne r. Fenton, sup. p. 3.

<sup>(</sup>r) Daniels v. Davison, 16 Ves. jun. 249.

<sup>(</sup>s) Mason v. Corder, 2 Marsh. 332.

<sup>(</sup>t) Collier v. Jenkins, 1 You. 295.

<sup>(</sup>u) Fordyce v. Ford, 4 Bro. C. C. 494; and see 6 Ves. jun. 670; 10 Ves. jun. 508; Burnell v. Brown, 1 Jac. & Walk. 168.

sidered as an authority, except on the ground of the price being unreasonable, for equity will in ordinary cases grant the vendor time to procure the fee. See infra, ch. 8.

that sixty-two acres were leasehold, and only eight freehold; yet, as the purchaser proceeded in the treaty after he was in possession of this fact, and did not object to the nature of the property, he was held to have waved the objection.

(\*) And if a purchaser do object to the tenure, yet, if he proceed in the treaty, it seems that he will be compelled to take the estate, on being allowed a compensation(x).

In the case of Wirdman v. Kent(y), upon a bill filed by vendors for a specific performance, it appeared that part of the lands sold to the purchaser had been previously sold to one Pavey; a specific performance was however decreed, and, as to the lands terriered to the defendant, but which had been sold to Pavey, that the plaintiffs should procure Pavey to release them to the defendant, or convey a like quantity of land of equal value to the defendant.

The particular circumstances of this case do not appear in the report; but it must be presumed, that the land sold to Pavey was not the object of the purchaser; and that other land in the neighborhood, of equal value, would suit him as well. Indeed, in one report of this case(z), it is said, that the grievances complained of were disregarded as frivolous.

To guard against the rules established by the foregoing decisions, an express declaration should be inserted in all agreements for purchase of estates, that if a title cannot be made to the whole estate, the purchaser shall not be bound to perform the contract pro tanto; and a similar provision should be made where an estate is bought free from tithes, or with any other collateral benefit, which the purchaser may wish to secure.

<sup>(</sup>x) See Calcraft v. Roebuck, 1 Ves. jun. 221.

<sup>(</sup>y) 1 Bro. C. C. 140.

<sup>(</sup>z) 2 Dick. 594.

<sup>(\*300)</sup> 

There may be some rights in an estate not disclosed, which, although in themselves of small value, are incapable of compensation; for example, a right of sporting reserved over the estate, and not disclosed to the purchaser; for it would not perhaps be possible to estimate (\*) what difference in value such a reservation made(a); and such a right would break in too much upon the enjoyment and ownership of a purchaser, to enable equity with propriety to compel him to take the estate with a compensation.

II. Having considered in what cases a vendor may compel a performance pro tanto of an agreement, which he is unable wholly to perform; we may now inquire in what instances a purchaser may insist upon a part performance of an agreement, which the vendor cannot execute in toto.

And first, it seems that in every case where an agreement would be in part executed in favor of a vendor, there is much greater reason to afford the aid of the Court at the suit of the purchaser, if he be desirous of taking the part to which a title can be made. And a purchaser may, in some cases, insist upon having the part of an estate to which a title is produced, although the vendor could not compel him to purchase it: it is true, generally, but not universally, that a purchaser may take what he can get, with compensation for what he cannot have(b).

Thus we have seen, that if tenants in common contract for the sale of their estate, and one of them die, the survivors cannot compel the purchaser to take their shares, unless he can obtain the shares of the deceased. But the

<sup>(</sup>a) Burnell v. Brown, 1 Jac. & Walk. 168.

<sup>(</sup>b) 1 Ves. & Beam. 358, per Lord Eldon; Western v. Russell, 3 Ves. & Beam. 187; Wheatley v. Slade, 4 Sim. 126.

converse of this proposition does not hold; for the purchaser may compel the survivors to convey their shares, although the contract cannot be executed against the heir of the deceased(c). So even where a vendor has (\*)not a title to a part of the estate, and consequently cannot enforce the acceptance of it, yet the purchaser may elect to take it with the title such as it is(d). But a purchaser has no such right where there is a stipulation that the contract shall be void if the purchaser's counsel is of opinion that a good title cannot be made to the estate(e).

If a man, having partial interests in an estate, chooses to enter into a contract, representing it, and agreeing to sell it, as his own, it is not competent to him afterwards to say, though he has valuable interests, he has not the entirety; and therefore the purchaser shall not have the benefit of the contract. For the person contracting under these circumstances is bound by the assertion in his contract: and if the vendee chooses to take as much as he can have, he has a right to that, and an abatement (f).

Therefore in a case where the estate was sold for twenty-one years, and represented as held under a church lease, usually renewed every seven years, and it appeared that the seller was only entitled for life to part; the purchaser filed a bill for a specific performance with a reduction. The seller insisted that the purchaser might have an option to put an end to the contract, but that he (the seller) ought not to be compelled to take less than the stipulated price. The decree, however, was for a specific performance, with a reduction of the purchase-money, the interest of the seller being less valuable than it had been repre-

<sup>(</sup>c) Attorney-general v. Gower, 1 Ves. 218.

<sup>(</sup>d) Vide infra.

<sup>(</sup>e) Williams v. Edwards, 2 Sim. 78.

<sup>(</sup>f) Per Lord Eldon, 10 Ves. jun. 31, 516. The same doctrine was laid down by his Lordship in Wood v. Griffith, 12 Feb. 1818; and see 2 Ves. jun. 439, acc. per Lord Rosslyn.

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sented to the purchaser(g). Lord Eldon has since observed, that the consequence of this decision was, that if the lives should endure beyond the period of twenty-one years, the (\*) purchaser would have the premises as well as the compensation. In that respect the case was new, and deserved great consideration. The Lord Chancellor added, that in a conversation which he had with the Master of the Rolls, they inclined to think it might be right upon this reasoning, that the estate was purchased subject to a contingency affecting its immediate value; he could not carry it to market, he could do nothing with it that would make it absolute property in him as if he had an absolute term of twenty-one years; but as the compensation might be aggravated enormously, beyond the actual value, so it might be much too small, and the Court would throw the chances together. The only other course was to adopt the principle of indemnity, either by taking security, or laying hold of part of the purchase-money, with a view to compensation if the case should arise, and that was open to this difficulty, that the property held subject to the question of indemnity remains unsaleable, unmarketable, and of infinitely less value than it would otherwise be.

In a later case(h), upon a sale of leasehold for lives, the representation of the seller was held to amount to this: that the lessee thereof upon lives, under a church lease, granted the lease in question, with covenants, binding his real and personal representatives to procure renewals to make the complete term sold. It appeared, however, that the covenant to renew was limited, and not binding to the extent mentioned, the estate being in settlement, and the covenants not general. The purchaser filed a bill for a specific performance, with an allowance. In effect the difference was between a cove-

<sup>(</sup>g) Dale v. Lister, 16 Ves. jun. 7, cited.

<sup>(</sup>h) Milligan r. Cooke, 16 Ves. jun. 1.

nant by the lessor binding all his assets real and personal, and a covenant which only bound that property which (\*) the lessor might permit to go from him to his son, who would be entitled to the property under the settlement. Lord Eldon felt great doubt whether that could be made the subject of a valuation. The purchaser, however, only desired an indemnity upon a real estate; or by part of the purchase-money to be kept in Court, the sellers receiving the dividends. The Lord Chancellor decreed a specific performance, and directed an inquiry what was the difference between the value of the interest actually sold, and that represented, and such difference to be deducted from the purchase-money; and if the Master should find that he was unable to ascertain such difference in value, or if the purchaser should choose to take the title with a sufficient indemnity, he might, and the decree was affirmed upon a rehearing.

But the general rule, independently of special circumstances, is, that the Court can neither compel a purchaser to take an indemnity nor a veudor to give it(i)(190).

Although a purchaser may in most cases insist upon taking the interest which the vendor can give him, yet it seems that equity will not decree an under-lease on an agreement to assign, though it appear that the assignment cannot be made without a forfeiture; for the defendant, in agreeing to assign, might intend to discharge himself from covenants to which he would continue liable by the under-lease(k). This is, however, a defence which a

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<sup>(</sup>i) 1 Ves. & Beam. 255; vide post, ch. 7; Paton v. Brebner, 1 Bligh, 66.

<sup>(</sup>k) Anon. E. T. 1790; Fonbl. n. (r), to 1 Trea. Eq. 211, 2 edit. See Mason v. Corder, 2 Marsh. 332.

<sup>(190)</sup> See Hapburn v. Auld, 5 Cranch, 262. See also the opinion of SPENCER, J. in Water's v. Travis, 9 Johns. Rep. 464, 465. See also, Chinn v. Heale, 1 Munf. 63. M'Connell's Heirs v. Dunlap's Dev. Hardin, 41.

vendor can seldom set up against a purchaser's claim, where the purchaser chooses to accept an under-lease; for an assignee of a lease almost invariably covenants to indemnify his vendor from the rent and covenants in the (\*)lease, and from these covenants he cannot of course discharge himself by an assignment, any more than by an under-lease.

So it has been determined by Lord Redesdale, that where, at the time of the contract, the purchaser is fully aware that the vendor cannot execute the agreement, and, consequently, cannot enforce the performance of it; there the agreement must be presumed to have been executed under a mistake, and the purchaser cannot insist upon a performance as to the interest to which the vendor may be actually entitled (l).

And in a case where a tenant for life, with a power of leasing for twenty-one years at a rack-rent, agreed to execute a lease for twenty-one years, and a further lease for twenty-one years at any time during his life, consequently to execute a lease for twenty-one years, whatever might be the increased value of the property at the time the lease should be granted; Lord Redesdale considered it a contract to act in fraud of the power, and that the lessee was not entitled to a specific performance. To obviate this objection, the lessee offered to take a renewed lease for twenty-one years, if the lessor should so long live; but Lord Redesdale thought that this was one of those cases where the plaintiff had no right thus to qualify the contract he insisted upon: there was nothing in the case to show that satisfaction in the form of damages was not an adequate remedy for him. If he had been put into a situation from which he could not extricate himself, the defendant might be called on to make the best title in his power, but nothing could be

<sup>(</sup>l) Lawrenson v. Butler, 1 Scho. & Lef. 13; see Mortlock v. Buller, 19 Ves. jun. 292.

more mischievous than to permit a person who knows (\*)that another has only a limited power, to enter into a contract with that other person, which, if executed, would be a fraud on the power, and when that was objected to, to say, "I will take the best you can give me." A court of equity ought to say, to persons coming before it in such a way, "make the best of your case with a jury" (m)(191).

It should be observed that there was another point in the above cause, and the decree was pronounced after considerable doubts. It seems difficult to reconcile the opinion expressed by Lord Redesdale with the current of authorities. It was not a necessary consequence of the contract that the lease agreed to be granted would be a fraud on the power, and the purchaser was willing to take the interest which the seller was enabled to grant without risk to himself or injury to the remainder-men.

If in a case of this nature, the purchaser, on the faith of the agreement, put himself in a situation from which he cannot extricate himself, and is therefore willing to forego a part of his agreement, that is a circumstance to induce a court of equity to give relief. Thus, in a case before Lord Thurlow, the incumbent of a living had, with full knowledge of the title, contracted with the tenant in tail, in remainder after a life estate, for the purchase of the advowson, and on the faith of that agreement had built a much better house than he would otherwise have done; the tenant for life would not join in suffering a recovery, and consequently a good title could not be made. Lord Thurlow held, that as the purchaser had, upon the faith of the contract, built a good house on the glebe, he ought to have the utmost the vendor could give him; and therefore directed the vendor to

<sup>(</sup>m) Harnet v. Yielding, 2 Scho. & Lef. 549; vide supra, p. 209.

<sup>(191)</sup> See Graham v. Hendren, 5 Munf. 183.

<sup>(\*806)</sup> 

(\*)convey a base fee, by levying a fine with a covenant to suffer a recovery whenever he should be enabled to do so by the death of the tenant for life(n).

If the vendor has granted a lease of the estate which is void by force of a statute, the Court will not, on the request of the purchaser, consider the lease as valid, and allow him a compensation in respect of it(o).

## **3000**

#### SECTION II.

Of Defects in the Quality of the Estate.

In most cases on this head, the rule "caveat emptor" applies, and therefore, although there be defects in the estate, yet, if they are patent, the purchaser can have no relief(p)(192).

- (n) Lord Bollingbroke's case, cited 1 Scho. & Lef. 19, n. (a).
- (o) Morris v. Preston, 7 Ves. jun. 547.
- (p) See the introductory Chapter; and see Lowndes v. Lane, 2 Cox, 363.

Imposition and fraud upon the purchaser by any wilful misrepresentation or concealment, takes the case out of the general rule, and entitles him to be redressed in equity, in addition to and beyond the cov-

<sup>(192)</sup> The maxim caveat emptor will not be applied against a purchaser, where there has been fraud or misrepresentation on the part of the vendor. Pringle v. Samuel, 1 Litt. 46. See Sherwood v. Salmon, 5 Day, 439. Consistent with this principle, are the decisions in Bostwick v. Lewis, 1 Day, 33, 250., and in Norton v. Hathaway, 1 Day, 255. note d. These were actions at law. But in Sherwood v. Salmon, 2 Day, 128, which was also an action at law, (See S. C. ut supra) the principle laid down in the text, was fully recognized. The rule caveat emptor does not apply to sales by a master, because he is considered as the agent of the parties. Tunno v. Fludd, 1 M'Cord, 122.

Thus, where a meadow was sold without any notice of a footway round it, and also one across it, which of course lessened its value, Lord Rosslyn decreed a specific performance with costs, as he could not, he said, help the

enants in the deed. The cases of Bumpus v. Platner, 1 J. Ch. R. 213; Abbot v. Allen, 2 ib. 519; Johnson v. Geer, ib. 546; Chesterman v. Gardner, 5 ib. 29; and Governeur v. Elmendorf, ib. 79; are authorities for this: and also for the point, that a grantee, to whom possession has been delivered under covenants of title and warranty, can have no relief in equity against his grantor for a return of purchase-money or security on account of a defect or failure of title: because he has secured himself by covenant; and he has an adequate remedy at law. If he has taken no covenants, and the title fails, he will be without remedy in equity, as well as at law, if the contract were fair and there be no fraud in the case.

The late case of Deniston et al, assignees v. Morris et al, assignees, 2 Edw. Ch. R. 27. was thus: the defendants sold an estate to one Sandford with promises of title and a warranty. The latter entered into possession and made improvements in buildings, &c.: and then defendants would only give him a deed with covenants as to their own acts. They represented the title as good; and engaged that they would not transfer the mortgage he was to give for the purchase-money; so that if the title failed the same should be restored. Sandford sold his interest to Dickey; and one Jackson sued Dickey and recovered having a paramount title. Dickey also was obliged to pay the mortgage; the defendants having contrary to their promise transferred it. Dickey failed; and the complainants as his assignees sued this bill alleging that the defendants had funds sufficient in their hands. The Vice Chancellor observed that, "the difficulty in the case is this; that Sandford is not the party complaining of the fraud; nor, indeed has he been injured by it. He sold the property without fraud and without covenants for an adequate consideration. According to the statement of the transaction the vendors became trustees of that part of the purchase-money, which was secured by mortgage. An implied trust, at least, was created of the purchase-money; and such an one as this court is bound to protect and preserve.-If then there be a trust fund and trustees of it; for whose benefit does it enure? The title was to be made satisfactory to Sandford and his assigns. A loss resulted in the failure of the title; and this loss has been borne by Dickey; and he or those standing in his place, are the persons entitled to the benefit of it. Consequently, the demurrers which had been filed were overruled.

purchaser who did not choose to inquire(q). It was not a latent defect. Lord Manners has said, that he believed the bar was not very well satisfied with the decision, although, as he observed, the purchaser was undoubtedly extremely negligent not to look at the estate before he purchased it(r).

So a description, that the land was uncommonly rich water meadow, was held to be immaterial, although the property was imperfectly watered. The Court thought (\*)that it would be straining the meaning of the words "uncommonly rich water meadow land," if it were not confined to the quality of the land; and in that sense it professed to be nothing more than the loose opinion of the auctioneer or vendor as to the obvious quality of the land, upon which the vendee ought not to have placed, and could not be considered to have placed, any reliance(s).

And here a case(t) may be introduced, where the subject of the contract was a house on the north side of the river Thames, supposed to be in the county of Essex, but which turned out to be in Kent; a small part of which county happens to be on the other side of the river. The purchaser was told he would be made a churchwarden of Greenwich, when his object was to be a freeholder of Essex; yet he was compelled to take the house.

This decision, however, seems to be opposed by a case before Lord Talbot. An agreement was entered into for the purchase of a house for a coffee-house. It was found that a chimney could not be made convenient for a coffee-house; but nevertheless, the vendor filed a bill against the purchaser, to compel him to perform the agreement. Lord Talbot dismissed the bill, merely because the tenant

<sup>(</sup>q) Oldfield v. Round, 5 Ves. jun. 508.

<sup>(</sup>r) 1 Ball & Beatty, 250; and see Legge v. Croker, ib. 506.

<sup>(</sup>s) Scott v. Hanson, 1 Sim. 13.

<sup>(</sup>t) Shirley v. Davies, in the Exchequer, 6 Ves. jun. 678, cued.

would be obliged to take it for a purpose he did not want(u).

But it may be remarked, that it is no bar to a specific performance, that the conveyance will not have the operation which the vendor thought it would. Thus where a tenant for life of a copyhold purchased the reversion in the hope of extinguishing contingent remainders, and afterwards finding that the conveyance would not affect the remainders, brought a bill to be relieved against the (\*)security which he had given for the purchase-money; the Court gave him his option either to pay the principal, interest and costs, or to have his bill dismissed with costs(x).

So in a case where, under the *legal construction* of the terms of an agreement for a lease, the option to determine the lease was in the lessee only, and it was argued against a specific performance, that this was contrary to the intention, the Master of the Rolls said that a specific performance of a written agreement cannot be denied because the meaning of the parties does not appear(y).

But where a vendor gives a false description of the estate, the purchaser may at law rescind the contract (193). As where before the Reform Act an estate was stated to be but one mile from a borough town, and it turned out to be between three and four, the contract was held to be voidable by the purchaser (z). And the same rule must

<sup>(</sup>u) 1 Russ. & Myl. 128; 1 Ves. 307; and see 13 Ves. jun. 78.

<sup>(</sup>x) Mildmay v. Hungerford, 2 Vern. 243.

<sup>(</sup>y) Price v. Dyer, MS., Rolls; S. C. 17 Ves. jun. 356.

<sup>(</sup>z) Duke of Norfolk v. Worthy, 1 Camp. Ca. 337; vide supra, p. 42; and see Fenton v. Browne, 14 Ves. jun. 144; — v. Christie, 1 Salk. 28, by Evans; Trower v. Newcombe, 3 Mer. 704.

<sup>(193)</sup> See Sherwood v. Salmon, 5 Day, 439. S. C. at law. 2 Day, 128. See also, Bostwick v. Lewis, 1 Day, 33, 250. Norton v. Hathaway, 1 Day, 255. note d.

<sup>(\*309)</sup> 

prevail in equity where the misdescription, as in this case, is not from the nature of it a subject of compensation.

So in a case where the estate was described to have lately undergone a thorough repair, whereas it was in a complete state of ruin, and ordered to be pulled down by the district surveyor, the purchaser was allowed to rescind the contract(a). And where the state of the repairs was falsely represented by the seller, knowing that the house had the dry-rot, without communicating that fact to the purchaser, upon a bill filed by the seller, a specific performance was decreed, with a compensation to the purchaser(b).

(\*) So where the purchaser of a leasehold house was aware of the ruinous state of the premises, but no mention was made at the sale by auction of a notice to repair given to the vendor by the lessor, on the day before the sale, under which the lessor re-entered and evicted the purchaser, he (the purchaser) was permitted to recover the deposit from the auctioneer, on the ground that in such transactions good faith was most essential, and the vendor or his agent was bound to communicate to the vendee, the fact of such notice (c).

Again, where a person for whose life the property was held, was described to be a very healthy gentleman, and in another passage a healthy gentleman, and the sellers had shortly before the sale insured the life at a sum exceeding the highest rate charged for a healthy life of the same age, the bill of the sellers for a specific performance was dismissed with costs(d).

But if the purchaser knew that the description was

<sup>(</sup>a) Loyes v. Rutherford, K. B. 16 May 1809.

<sup>(</sup>b) Grant v. Munt, Coop. 173.

<sup>(</sup>c) Stevens v. Adamson, 2 Stark. 422.

<sup>(</sup>d) Brealey v. Collins, 1 You. 317.

false, he cannot, it seems, take advantage of it either at law or in equity (194).

Thus, in a case before Sir William Grant(e), where an estate was described as being within a ring fence, it appeared, that the estate was intersected by other lands, and did not answer the description, but that the purchaser knew the situation of the estate; his Honor (after expressing a doubt whether such an objection was a subject of compensation, as it was not certain that a precise pecuniary value could be set upon the difference between a farm compact in a ring fence, and one scattered and dispersed with other land), said, that the purchaser was clearly excluded from insisting upon that as an objection to complete the contract. He saw the farm before he (\*)purchased; he had lived in the neighborhood all his life. This variance was the object of sense; he must have known whether the farm did lie in a ring fence or not; and upon the same ground, that the purchaser could not get rid of the contract on account of the difference in the description of the farm, his Honor determined he could not be entitled to compensation. If a compensation was given to him, he would get a double allowance; for if he had knowledge that what he proposed to purchase did not answer the description, it must be taken that he bid so much the less.

This case, we observe, went a step farther than either the case before the Court of Exchequer, or that before Lord Rosslyn, in neither of which was there any warranty

## (e) Dyer v. Hargrave, 10 Ves. jun. 505.

<sup>(144)</sup> A purchaser of land, being informed of defects in the vendor's title, and agreeing, nevertheless, to pay interest on the purchase money, from a certain day, shall not be relieved from the payment of it, on the ground that he could not get possession of part of the land, which he knew, at the time of entering into the agreement, was held by another person. Mayo v. Percell, 3 Munf. 243.

<sup>(\*311)</sup> 

or false description. But in this case it was expressly stated, that the whole estate was within a ring fence; but the Master of the Rolls thought that circumstance immaterial, as the purchaser knew the description was false; and his Honor appears to have grounded his decision on the doctrine, that even at law a warranty is not binding where the defect is obvious, and put the cases of a horse with a visible defect, and a house without a roof or windows warranted as in perfect repair.

But where a particular description is given of the estate, which turns out to be false, and the purchaser cannot be proved to have had a distinct knowledge of the actual state of the subject of the contract, he will be entitled to a compensation, although he may be compelled to perform the contract.

Thus, in the case before the Master of the Rolls, the particular described the house as being in good repair, and the farm as consisting of arable and marsh land, in a high state of cultivation. It appeared, however, that the house was not in good repair, and that the land was not in a high state of cultivation. The judgment contains (\*)the facts of the case, and is highly satisfactory. His Honor said, "These objections are such as a man may have an indistinct knowledge of, and he may have some apprehension that, in those respects, the premises do not completely correspond with the description, and yet the description may not be so completely destroyed as to produce any great difference in his offer. As to the marsh land, it is very uncertain, whether, by any view, it was possible for him to judge of that. It is stated by many witnesses, that the season of the year was just at the breaking of a frost, and represented that no man could, at that time, say whether the land was well or ill cultivated. So he may have seen some trifling defects in the house, and might not intend to make the objection, if they turned out to be nothing more than they appeared upon the surface. He might consider them too trivial, and not mean to claim compensation for an objection so insignificant. But afterwards, when he came to examine, according to this evidence, he discovered that the house was materially defective, and very much out of repair. Admitting that he might, by minute examination, make that discovery, he was not driven to that examination; the other party having taken upon him to make a representation: otherwise he would be exonerated from the consequence of that in every case where, by minute examination, the discovery could be made. The purchaser is induced to make a less accurate examination by the representation, which he had a right to believe. This purchaser, therefore, is entitled to compensation for the defects of the house, and the cultivation of the marsh land."

But notwithstanding that the foregoing case has established, that the repairs necessary to a house are a subject of compensation, although the house is described to be in good repair, yet his Honor seemed to admit, that if the purchaser wanted possession of the house to live in at (\*)a given period, by which time the repairs could not be completed, he ought not to be bound to complete the contract(f).

Where the defect is a *latent* one, and the purchaser cannot by the greatest attention discover it, if the vendor be aware of it, and do not acquaint the purchaser with the fact, he may set aside the contract at law, although he bought the estate with all faults(g); and equity will not enforce a specific performance(h).

This was decided at law, by Lord Kenyon at nisi prius, upon the sale of a ship. It was insisted, for the seller, that the rule caveat emptor applied; but Lord Kenyon

<sup>(</sup>f) Vide infra, ch. 8.

<sup>(</sup>g) Mellish v. Motteux, Peake's Ca. 115.

<sup>(</sup>h) Oldfield v. Round, 5 Ves. jun. 508.

<sup>(\*313)</sup> 

said, that there are certain moral duties, which philosophers have called duties of imperfect obligation, such as benevolence to the poor, and many others, which courts of law do not enforce. But in contracts of all kinds, it is of the highest importance that courts of law should compel the observance of honesty and good faith. This was a latent defect, which the plaintiffs could not, by any attention whatever, possibly discover; and which the defendants knowing of, ought to have disclosed to the plaintiffs. The terms to which the plaintiffs acceded, of taking the ship with all faults, and without warranty, must be understood to relate only to those faults which the plaintiffs could have discovered, or which the defendants were unacquainted with.

In a late case(i), the same point arose before Lord Ellenborough at nisi prius; but ultimately it was not necessary to decide it. Lord Kenyon's decision was cited. Lord Ellenborough said, that he could not subscribe to (\*)the doctrine of that case, although he felt the greatest respect for the authority of the Judge by whom it was decided. Where an article is sold with all faults, he (Lord Ellenborough) thought it was quite immaterial how many belonged to it within the knowledge of the seller, unless he used some artifice to disguise them, and to prevent their being discovered by the purchaser. The very object of introducing such a stipulation is, to put the purchaser on his guard, and to throw upon him the burthen of examining all faults, both secret and apparent. A man may be possessed of a horse he knows to have many faults, and wish to get rid of him, for whatever sum he would fetch. He desires his servant to dispose of him; and, instead of giving a warranty of soundness, to sell him

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 <sup>(</sup>i) Baglehole v. Walters, 3 Camp. Ca. 154. See 1 Ball & Beatty,
 515. Early v. Garrett, 9 Barn. & Cress. 928; 4 Man. & Ryl. 687,
 S. C.

with all faults. Having thus laboriously freed himself from responsibility, is he to be liable, if it be afterwards discovered that the horse was unsound? Why did not the purchaser examine him in the market when exposed to sale? By acceding to buy the horse with all faults, he takes upon himself the risk of latent or secret faults, and calculates accordingly the price which he gives. It would be most inconvenient and unjust if men could not, by using the strongest terms which language affords, obviate disputes concerning the quality of the goods which they sell. In a contract such as this, his Lordship thought there was no fraud, unless the seller, by positive means, renders it impossible for the purchaser to detect latent faults; and he made no doubt, that this would be held as law when the question should come to be deliberately discussed in any court of justice.

In a still later case, upon the sale of a ship, the parti-'cular stated, amongst other things, that the hull was nearly as good as when launched. And after stating when she was to be seen, added, "with all faults as they now lie." Then followed an inventory of the stores, to which the (\*)following declaration was added, "the vessel and her stores to be taken with all faults as they now lie, without any allowance for weight, length, quality, or any defect whatsoever." The ship was quite unseaworthy. She belonged to underwriters to whom she had been abandoned. The agents for the sale must have known her defects, and she was kept constantly affoat, so that her defects could not be discovered. The person who framed the particular had not examined the vessel(k)(195). Mansfield, C. J. said that these words were very large, to exclude the buyer from calling upon the seller for any defect in the thing sold, but if the seller was guilty of any positive

<sup>(</sup>k) Schneider v. Heath, 3 Camp. Ca. 506.

<sup>(195)</sup> See *Dyer* v. *Lewis*, 7 Mass. Rep. 284. (\*315)

fraud in the sale, these words will not protect him. There might be such fraud either in a false representation, or in using means to conceal such defect. He thought the particular was evidence here by way of representation, that states the hull to be nearly as good as when launched, and that the vessel required a most trifling outfit. Now, was this true or false? If false, it was a fraud, which vitiates the contract. What was the fact? The hull was worm-eaten, the keel was broken, and the ship could not be rendered seaworthy without a most expensive outfit. The agent says, that he framed this particular without knowing any thing of the matter. But it signifies nothing whether a man represents a thing to be different from what he knows it to be, or whether he makes a representation which he does not know at the time to be true or false, if, in point of fact, it turns out to be false. But, besides this, it appears here that means were taken fraudulently to conceal the defects in the ship's bottom. These must have been known to the captain, who was to be considered the agent of the owners, and he evidently, (\*)to prevent their being discovered by persons disposed to bid for her, removed her from the ways where she lay dry, and kept her afloat in the dock till the sale was over. Therefore, consistently with the decided cases upon this subject, the learned Judge was of opinion, that the purchaser was entitled to recover back his deposit.

In a case which occurred a few months before, upon the sale of a ship, where the Court held that, in point of fact, there was no fraud, Mr. Justice Heath said, that the meaning of selling "with all faults" is, that the purchaser shall make use of his eyes and understanding to discover what faults there are. He admitted that the vendor was not to make use of any fraud or practice to conceal faults. The learned Judge adhered to the doctrine of Lord Ellenborough, above stated, without any difficulty. Mr. Justice Chambre held, there must be evidence of

fraud to enable the Court to depart from the written agreement. Mr. Justice Gibbs agreed with Lord Ellenborough's doctrine. Even if there had been a representation it would not have availed. He held, that if a man brought him a horse, and made any representaion whatever of his quality and soundness, and afterwards they agreed in writing for the purchase of the horse, that shortened and corrected the representations, and whatsoever terms were not contained in the contract would not bind the seller. But the learned Judge agreed that fraud would not be done away by the contract, and he mentioned the case of a sale of a house, where the seller being conscious of a defect in a main wall, plastered it up and papered it over, and it was held that as the seller had expressly concealed it, the purchaser might recover (l). (\*) As the law now stands, unless there be actual fraud, the written contract cannot be avoided(I).

But the ground and basis of an action in a case of this nature, for recovery of a deposit, where the contract is in fieri; or of damages, where the contract is actually executed, is the scienter; and, therefore, if the vendor was not aware of the defect, he will not be answerable for it. Nor will trifling defects be a sufficient foundation for such an action.

Thus, in a case (m) where a purchaser brought an action against a vendor, to recover damages for having sold him a house, knowing it had the dry-rot; it appeared, that the house was situated in a clayey soil, and that the floor lay near the ground, by which some of the timbers had rotted; but the vendor was not aware of the defects, and the purchaser was nonsuited. Lord Kenyon said,

<sup>(1)</sup> Pickering v. Dowson, 4 Taunt. 779. See Jones v. Bowden, ib. 847; Shepherd v. Kain, 3 Barn. & Ald. 240.

<sup>(</sup>m) Bowles v. Atkinson, N. P. MS.

<sup>(</sup>I) As to concealment of defects of title, see post. (\*317)

the circumstances that had been proved in this case might be described by a word that was used by one of the witnesses; they were mere bagatelles. If these small circumstances were to be the foundation of an action, every house that was sold would produce an action. If a broken pane of glass that might be found in a garret window, perhaps, had not been described by the seller, it would be ground of an action. If he was to consider himself as a witness in the cause, he could say he had met with something of this kind, and he never thought himself imposed upon, because now and then some rotten boards and rotten joists might be found about a house. Besides, there was no imposition, no mala fides in this case.

Although the purchaser might, with proper precaution, (\*)have discovered the defect; yet if, during the treaty, the vendor *industriously* conceal the fact, equity will not assist him.

Thus, upon a suit for a specific performance, the defence was, that the estate was represented to the defendant as clearing a net value of 90l. per annum, and no notice was taken to him of the necessary repair of a wall to protect the estate from the river Thames, which would be an out-going of 50l. per annum. And it appearing, upon evidence, that there had been an *industrious concealment* of the circumstances of the wall during the treaty, the Lord Chancellor dismissed the bill, but without costs(n).

And here a case may be mentioned, where an estate appeared to be subject to a right of entry to dig for mines; the *purchaser* did not object to the title on this ground, but insisted upon a specific performance with a compensation, which was accordingly decreed (o).

<sup>(</sup>n) Shirley v. Stratton, 1 Bro. C. C. 140.

<sup>(</sup>o) Seaman v. Vawdrey, 16 Ves. jun. 390.

#### SECTION III.

# Of Defects in the Quantity of the Estate.

If a purchaser of an estate thinks he has purchased bona fide a part which the vendor thinks he has not sold, that is a ground to set aside the contract, that neither party may be damaged; because it is impossible to say, one shall be forced to give that price for part only which he intended to give for the whole; or that the other shall be obliged to sell the whole for what he intended to be the price of part only(p). Upon the other hand, if both (\*)understood the whole was to be conveyed, it must be conveyed. But again, if neither understood so, if the buyer did not imagine he was buying any more than the seller imagined he was selling the part in question, then a pretence to have the whole conveyed is as contrary to good faith on his side, as a refusal to sell would be in the other case(q)(197).

If an estate be sold at so much per acre, and there is a deficiency in the number conveyed, the purchaser will be entitled to a compensation, although the estate was estimated at that number in an old survey(r)(198).

<sup>(</sup>p) See 13 Ves. jun. 427; and see Higginson v. Clowes, 15 Ves. jun. 516, stated, as to this point, supra, p. 38.

<sup>(</sup>q) Per Lord Thurlow. See 1 Ves. jun. 211; and see 6 Ves. jun. 339.

<sup>(</sup>r) Sir Cloudesley Shovel v. Bogan, 2 Eq. Ca. Abr. 688, pl. 1.

<sup>(197)</sup> See Nelson v. Matthews, 2 Hen. & Munf. 164.

<sup>(198)</sup> See Quesnel v. Woodlief, 2 Hen. & Munf. 173. in note. Jollife v. Hite, 1 Call, 301. Nelson v. Carrington, 4 Munf. 332. Carter v. Campbell, Gilmer, 159.

<sup>(\*319)</sup> 

The rule is the same, though the land is neither bought nor sold professedly by the acre; the presumption is, that in fixing the price, regard was had on both sides to the quantity which both suppose the estate to consist of. The demand of the vendor, and the offer of the purchaser, are supposed to be influenced in an equal degree by the quantity, which both believe to be the subject of their bargain. The general rule therefore is, that where a misrepresentation is made as to the quantity, though innocently, the right of the purchaser is to have what the vendor can give, with an abatement out of the purchasemoney, for so much as the quantity falls short of the representation(s)(199).

But where the lands in a conveyance are mentioned to contain so many acres by estimation, or the words "more or less" are added, if there be a small portion more than the quantity, the vendor cannot recover it; and if there be a small quantity less, the purchaser cannot obtain any compensation in respect of the deficiency (t). Indeed, (\*) a case is said to have been decided, where a man conveyed his land by the quantity of one hundred acres, were it more or less, and it was not above sixty acres; but the purchaser had no relief, because it was his own laches (u)(200).

<sup>(</sup>s) Hill v. Buckley, 17 Ves. 394, per Sir William Grant.

<sup>(</sup>t) Twyford v. Warcup, Finch, 310. See Marquis of Townshend v. Stangroom, 6 Ves. jun. 328; Rushworth's case, Clay. 46; Neale v. Parkin, 1 Esp. Ca. 229.

<sup>(</sup>u) Anon. 2 Freem. 106.

<sup>(199)</sup> See Waters v. Travis, 9 Johns. Rep. 465. on appeal. And where there is a great deficiency in the quantity of land, the purchaser is entitled to have the contract rescinded in toto. Glover v. Smith, 1 Des. 433. See also, Peay v. Briggs, 2 Rep. Con. Ct. 100.

<sup>(200)</sup> In Quesnel v. Woodlief, 2 Hen. & Munf. 173, 174; in note, the court say, that the words "more or less," inserted in a deed, "should be restricted to a reasonable or usual allowance for small errors in sur-

That however was the case of an actual conveyance. Where the contract rests in fieri, the general opinion has

veys, and for variations in instruments." See Smith v. Evans, 6 Binn. 102. Grantland v. Wight, 2 Munf. 179. Jollife v. Hite, 1 Call, 301. Mann & Toles v. Pearson, 2 Johns. Rep. 37. Snow v. Chapman, 1 Root, 528. Howes v. Barker, 3 Johns. Rep. 506. Powell v. Clark, 5 Mass. Rep. 355. Howe v. Bass, 2 Mass. Rep. 380. Jackson v. Barringer, 15 Johns. Rep. 471. Jackson v. Defendorf, 1 Caines' Rep. 493. Thomas v. Perry, 1 Peters' Rep. 49, 58. Dayne v. King, 1 Yeates, 322. Boar v. M'Cormick, 1 Serg. & Rawle, 166. Fleet v. Hawkins, 6 Munf. 188. Pringle v. Witten's Exrs. 1 Bay, 259. Gray v. Handkinson, 1 Bay, 278. Wainwright v. Read, 1 Des. 573. Jones' Dev. v. Carter, 4 Hen. & Munf. 184. Hull v. Cunningham's Exr. 1 Munf. 330, 335, 336.

"In a conveyance of land by deed, in which the land is certainly bounded, it is very immaterial, whether any or what quantity is expressed: for the description by the boundaries is conclusive. And when the quantity is mentioned in addition to a description of the boundaries, without any express cevenant that the land contains that quantity, the whole must be considered as mere description. (Per Parsons, C. J. 5 Mass. 155; S. P. in Large v. Penn, 6 S. & R. 488.) In the latter case cited in which the plaintiff sued the defendant for breach of covenant, it appeared that the deed described the land as "containing two acres and three quarters of an acre, being the lot mentioned in a plan or map of land (number 18, R. M. Penn,) and which, upon a partition and division of the said W. M., was, inter alia, allotted and assigned unto the said R. and M. Penn, her heirs and assigns forever." And then followed a special covenant of warranty in the usual form. The question being whether there was a covenant that the quantity of land should amount to two acres and three quarters? The court held, that there was not. It is the boundaries to which the grantee must look; he has a right to all the land within them: and the quantity is introduced, not by way of covenant, but of description.

So, in Davis et al. v. Rainsford, 17 Mass. R. 207, Wilde, J. in delivering the opinion of the court said—"no rule of law can be more firmly established, than that whenever, in the description of land conveyed by deed, known monuments are referred to as boundaries, they must govern; although neither courses, nor distances, nor the computed contents, correspond with such boundaries. But this fundamental rule in the construction of deeds is not inflexible, but like other rules of law, it must sometimes yield to exceptions. The reason why monuments are to govern the courses and distances in a deed, is that the

been that the purchaser, if the quantity be considerably less than it was stated, will be entitled to an abatement.

former are less liable to mistakes. When the reason of the rule ceases, the rule is not to be applied. When lines are laid down on a map or plan, and are referred to in a deed, the courses, distances, and other particulars appearing on such plan, are to be as much regarded as the true description of the land, as they would be, if expressly recited in the deed. This is a familiar rule of construction in all those cases, wherein no other description is given in the title deeds, than the number of the lot on a surveyor's plan of a township or other large tract of land.

The land in question was conveyed to the plaintiffs at the time they were about erecting a store; and it was stipulated in the deed, that the southwardly wall of the store should be placed exactly on the line last mentioned in the description of the land conveyed. The store was accordingly erected, and the southwardly wall was placed as it now stands, in conformity to the admeasurement, and to the plan, no objection being then made to its position by the grantor. This wall, when built, was a monument; and it was referred to in the deed, although it was not at that time erected. This part of the case is similar to the case of Makepeace v. Bancroft, 12 Mass. 469, excepting the wall in that case did not exactly coincide with the line, as described in the deed; and in the case before us it does. The case last cited was thus-"a certain piece of land in C. measuring on W. street 221 feet, and keeping the same width 70 feet back to another way, with all the privileges and appurtenances to the said lot belonging, meaning to convey thereby the same lot which was conveyed to the said grantor by M'Neil, by his deed dated, &c., including one half of the brick wall mentioned in the deed last aforesaid." The plaintiff sued for breach of covenant in respect to one half the brick wall, with the land under the same; there being no question as to the residue. It appeared at the trial, which was had before Jackson, J., that one Porter was seized of this lot, and also of another lot adjoining. He conveyed this to R., and the other to one W., who conveyed to S. Then R. and S. agreed to exchange lots and by direction of the latter the former conveyed to Neil. At the time of the conveyance by P., he owned a third lot on which was a brick house; and the deed to W. included one half of the wall of that house. R. intending to build on the lot he received from S. in exchange says in the deed to Neil "I do also convey to said Neil the one half of a brick wall that I hereby engage to erect on the adjoining lot now owned by S., which the said S. is this day to convey to me." S. conveyed to R. one half the wall of the house aforesaid; and R. undertaking to convey to the said appointee of S. one half of the wall which he was to build. 49

although the agreement contain the words more or less, or by estimation(x).

### (x) Hill v. Buckley, 17 Ves. 394.

But the wall of the house afterwards built by R. was built wholly on R.'s lot contrary to his intention, which was to place one half of the wall adjoining to Neil on his lot. The latter conveyed to defendant referring to R.'s deed and "including the one half of the brick wall mentioned in said deed." The defendant having conveyed his title to the plaintiff; and the Court held that Neil was seized of the lot, so as to include one half of the wall, which R. built for his use, and did of course convey the same to the defendant, who became seized until he parted with his title to the plaintiff. Whether this seizin was an indefeasible one or not, was immaterial in that action. The monument set up after the delivery of the deed, will conclude the grantor, even though it should not agree with the lines specified in the deed.

And if a survey is referred to in a deed, that is to be regarded, though the boundaries mentioned in the deed might exclude the land included in the survey. Lunt v. Holland, 14 ib. 149.

If land is bounded on a road, the land over which the road runs is excluded. Alden v. Murdock, 13 ib. So, to the bank of a stream, it excludes the stream. Hatch v. Dwight & al. 17 ib. 298. But if the boundary is by a river, it extends to the thread of the river, unless previous grants negative this construction. 14 ib. 149.

In Crosby v. Parker, (4 Mass. 110.) where the point in dispute was stated by Chief Justice Parsons in delivering the opinion of the Court thus. "E. & A. Jests were once seized in see of the several parcels of land mentioned in the case, one of which was claimed by Wilson, another by the demandant, and a third by J. Jefts, by separate deeds from E. & A., and under J. Jefts the tenant claims: And to find the issue in the cause it was necessary to ascertain the north-east corner of the parcel of land conveyed to the demandant by the deed of the said E. & A. dated 1805. This deed places the north-east corner at a stake and stones by Wilson's land on a certain highway. The next inquiry then is, where was Wilson's land? He had before purchased his parcel of the same grantors by a deed duly executed, and the stake and stones standing by this land of Wilson's is agreed. The tenant insists that this stake and stones is the north-east corner of the demandant's land; and if it is, the verdict is right. The same Wilson had contracted with J. Jefts, the brother and agent of the grantors, and had paid him for half an acre of land to the southward of his first purchase, and adjoining on the same highway, at the south-easterly corner of which was a stake and

But in a case where the estate was stated to contain by estimation forty-one acres, be the same more or less;

stones by the same highway, which would be the north-east corner of Crosby's land, if it bounded northwardly on the half acre, which he contends that it did: And if this last stake and stones is the north-east corner of Crosby's land, the verdict is wrong. The question therefore is reduced to this, whether Crosby's land adjoining northwardly on Wilson's first purchase, of which he had a conveyance, or on the half acre, of which he had no conveyance.

Wilson, after his bargain with J. Jefts, occupied the half acre for two years, as he would occupy his own land, including the time when Crosby's deed was executed, but he did not claim the land and would have informed any inquirer that he had no title to it, but had contracted with J. Jefts for one. In 1806, he applied to the owners, E. & A. Jefts for a title, but they refusing to give him one, he abandoned the occupation. It further appears that Crosby's deed conveys to him his land, with all the buildings thereon, and if he is bounded on Wilson's first purchase, there will be only a barn on his land; but if he is bounded on the half acre, there will be a house also included.

For the tenant it appears, that neither the grantor nor Parker had any knowledge that J. Jefts had bargained with Wilson for the half acre: and as to the expression of "all the buildings," it was found that the grantors purchased all these parcels of S. P. by a deed conveying them with all the buildings thereon, when in fact there were no buildings thereon, they having been erected afterwards: and that all the land, to which Wilson had any title on record, was his first purchase. The verdict is right, because Crosby's is northwardly on Wilson's land, and Wilson's first purchase is all the land that he in fact owned; and all the land, of which he had any title on record, by which the tenant could ascertain the boundaries, and all the land, which the grantors of Crosby, who were also the grantors of Wilson, could contemplate as Wilson's land. And if the first purchase of Wilson is not a boundary of Crosby's land, then there will be an half acre between Crosby and Wilson, the property of the grantors, not conveyed, and Crosby's northern boundary will be on other land of the grantors. Judgment on the verdict.

In Worthington et al. v. Hyllyer, 4 Mass. R. 197, where the estate intended to be conveyed included several particulars, which were necessary to ascertain the identity of the estate; held, that nothing could pass by the conveyance, except what agreed to every particular in the description; but every deed ought to be construed, if it can, that the intent of the parties may prevail, and not be defeated. If the description in a conveyance be so uncertain, that it cannot be known what

and upon an admeasurement, the quantity proved to be only between thirty-five and thirty-six acres; and the purchaser claimed an abatement; the Master of the Rolls decided against the claim. His Honor said, that the effect of the words "more or less" added to the statement of quantity had never been yet absolutely fixed by decision; being considered sometimes as intending to cover only a small difference the one way or the other;

estate was intended, the conveyance is void. In a deed-poll where there is a doubt, the construction must be against the grantor. But a description of land by a false reference must be rejected, if the land is sufficiently ascertained without.

Parsons, C. J. said.—It seems to be a general rule, that when the description of the estate intended to be conveyed includes several particulars, all of which are necessary to ascertain the estate to be conveyed, no estate will pass, except such as will agree to every particular of the description. Thus if a man grant all the land in his own occupation in the town of W., no estate can pass, except what is in his own occupation, and is also situate in that town.

But if the description be sufficient to ascertain the estate intended to be conveyed, although the estate will not agree to some of the particulars in the description, yet it shall pass by the conveyance, that the intent of the parties may be effected. Thus if a man convey his house in D., which was formerly R. C.'s, when it was not R. C.'s; but T. C.'s, the house in D. shall pass, if the grantor had but one house in D., because by the description of his house in D. the estate intended to be conveyed is sufficiently ascertained.

In the case before the court, the mortgagor has described, as the estate to be conveyed, all that his farm of land in W., on which he then lived, containing 100 acres, with his dwelling house and barn thereon standing. This is sufficient to ascertain the estate to be conveyed; and if no other particulars were inserted, there could be no doubt. But he adds that the farm, on which he lived, was the lot No. 17, in the first division of land there and included within certain limits mentioned. The limits of this lot are truly described, but in fact the farm, on which he lived, was not No. 17, but a different parcel of land. By the rule then this particular of the description is to be rejected, because without it the description is sufficiently certain; and because if it be essential, the deed will be void. Indeed rather than the deed should be void, a construction ought to be adopted, on which both the farm and the lot should be conveyed.

sometimes as leaving the quantity altogether uncertain, and throwing upon the purchaser the necessity of satisfying himself with regard to it. In this instance, the description was rendered still more loose by the addition of the words "by estimation." She estimated extent of ground frequently proves quite different from its contents by actual admeasurement. It cannot be contended that the terms "estimated" and "measured" have the same meaning. If a man was told that a piece of land was never measured, but was estimated to contain forty-one acres, would that representation be falsified by showing (\*)that, when measured, it did not contain the specified number of acres? The only contradiction to that proposition would be, that it had not been estimated to contain so much(y)(201).

### (y) Winch v. Winchester, 1 Ves. & Beam. 375.

(201) See Nelson v. Matthews, 2 Hen. & Munf. 164. It was decided in Carter v. Campbell, in the Court of Appeals in Virginia, (Gilm. R. 159.) that where a sale is by the acre, the right of ascertaining the quantity by a survey, exists, whether expressly reserved or not; and if no time be limited for making the election to survey, it may be done at any time before the whole business is closed. But where the articles of agreement have been carried into effect, by a conveyance from the vendor, and bond for the purchase money from the vendee, without a survey, there, in general, the contract is considered as closed. But there are cases, which are exceptions. For instance, where the real differs so much from the estimated quantity of land, as to make it evident, either that both parties were under a misapprehension, or one of them guilty of a gross fraud. (Per Tilghman, C. J. in Bailey v. Snyder, 13 S. & R. 161.) In Smith v. Evans, 6 Binn. 102, where the sale was decided to be for a sum in gross, although the price of twelve shillings per acre was mentioned, the articles had been carried into execution, by a conveyance from the vendor, and bond and mortgage from the vendee; "a circumstance of great weight with me, said the Chief Justice, in forming an opinion in that case." In the case last cited from S. & R., that circumstance did not exist; so that the contract was to be judged of only by the articles of agreement. Accordingly, it was there held to be a sale by the acre. It is proper to observe,

The case of Day v. Finn(z), however, seems a considerable authority, that at least the words more or less ought only to clear a small deficiency where the contract rests in fieri. There, in ejectment, the plaintiff declared on a lease for years of a house, and thirty acres of land in D.; and that J. S. did let to him the said messuage and thirty acres, by the name of his house in B., and ten acres of land there, sive plus sive minus: it was moved in arrest of judgment; because that thirty acres cannot pass by the name of ten acres, sive plus sive minus; and so the plaintiff had not conveyed to him thirty acres, for when ten acres are leased to him sive plus sive minus, these words ought to have a reasonable construction to pass a reasonable quantity, either more or less, and not twenty or thirty acres more. Yelverton agreed, for the word ten acres, sive plus sive minus, ought to be intended of a reasonable quantity, more or less, by a quarter of an acre, or two or three at most; but if it be three acres less than ten, the lessee must be contented with it. Quod Fenner and Crook concesserunt, and judgment was stayed.

And upon a motion in Portman v. Mill(a) it appeared

- (z) Owen, 133; and see the cases cited above.
- (a) 2 Russ. 570.

however, that the land was not certainly described; and the land was sold at a price named per acre.

A conveyance of a certian number of acres more or less imply, that the boundaries are fixed, and may contain more or less. They show an understanding of the parties that the boundaries should not be affected by a surplus or deficiency. Thus, in Glen et al. v. Glen, 4 S. & R. 488, the deed stated that the grantor conveyed 200 acres more or less. The parties afterwards had it surveyed; the survey agreed, except an allowance of six per cent. for roads, &c. It turned out however, after the decease of the parties, that the tract was in fact surplus, about 13 acres; and held, clearly, that the heirs could not recover a consideration for the excess: it not being so great as to show an essential mistake.

that the lands were described as containing, by estimation 349 acres, or thereabouts, be the same more or less, and the agreement stipulated that the parties should not be answerable for any excess or deficiency in the quantity of the premises, but that the premises should be taken by the purchaser at the quantity, whether more or less; and (\*)the actual number of statute acres was less by 100 acres than the number stated in the contract. Lord Eldon said, that as to this stipulation, he never could agree that such a clause (if there were nothing else in the case) would cover so large a deficiency in the number of acres as was alleged to exist there.

But however the rule may be finally settled, yet a seller knowing the true quantity, would not be allowed to practice a fraud, by stating a false quantity, with the addition of the words "more or less," or the like (b)(202).

If an estate be represented as containing a given quantity, although not professedly sold by the acre, the circumstance that the purchaser was intimately acquainted with the estate, would not necessarily imply knowledge of its exact contents; while a particular statement of the quantity would naturally convey the notion of actual admeasurement: and therefore the Court would not be warranted in inferring that the purchaser knew the real quantity (c). For, if the purchaser did know the real quantity, of course he could not claim any allowance for the deficiency.

In a late case(d), the agreement was to sell an estate "containing the several quantities after mentioned, that is to say, by the plan drawn by Mr. F. in 1792;" the agreement then proceeded to state the numbers and par-

<sup>(</sup>b) See Duke of Norfolk v. Worthy, 1 Camp. Ca. 337; supra, p. 38, and 1 Ves. & Beam. 377.

<sup>(</sup>c) Winch v. Winchester, 1 Ves. & Beam. 375.

<sup>(</sup>d) Gell v. Watson, 16 Nov. 1825, MS.

ticular quantities of each close, and then proceeded to add, "containing altogether about 101°. 3°. 29°." There was a deficiency of 2°. in two closes which together were stated to contain 8°. 1°. 4°. It was held that the purchaser was entitled to an abatement, as the quantity of each close was particularly specified.

(\*) The principle upon which an abatement in these cases is made, is, to place the parties in the situation in which they would have stood, if there had been no misrepresentation. Therefore, where a man purchased a wood, which was, by mistake, represented to contain nearly twenty-six acres more than it did, but the purchaser was, in the course of the negotiation, furnished with the value of the woods qua wood, so that he obtained the right quantity of wood but not of soil, the abatement was decreed to be only so much as soil covered with wood would be worth, after deducting the value of the wood(e).

Where lands are shown to a purchaser as part of his purchase, he will be entitled to them, although expressly excepted in his conveyance by name, provided he did not know them by that name(f)(203).

So if a man purchase an estate by a particular, and in the conveyance part of the land is left out, equity will relieve him(g); but it must be clear that he did purchase by the particular, because it is not a writing within the statute of frauds; and, therefore, unless that be the case, or the agreement can be otherwise proved, the Court cannot relieve(h).

(e) Hill v. Buckley, 17 Ves. jun. 394.

(f) Oxwick v. Brockett, 1 Eq. Ca. Abr. 355, pl. 5.

(g) Prec. Cha. 307, arguendo; and see Nelson v. Nelson, Nelson. Rep. 7.

(h) Cass v. Waterhouse, Prec. Cha. 29. See Clinan v. Cooke, 1 Scho. & Lef. 22; and see ch. 3, supra; and 2 Dow. 301.

<sup>(203)</sup> See opinion of PARSONS, Ch. J. in Worthington v. Hyllyer, 4 Mass. Rep. 205. (\*323)

On the other hand, the Court will equally relieve a vendor, where more land has passed than was contracted for; although in an early case(i)(I) this relief (\*)was denied; because the defendant was a purchaser upon valuable consideration. But it is now clear, that if land be expressly conveyed, or pass by general words, which was not mentioned in the particular by which the purchase was made, or was not intended to be conveyed, the purchaser will be decreed to re-convey it(k).

And where a purchaser took a conveyance of an estate from his own instructions, he was held not to be entitled to lands answering the general description in the advertisements of sale, but which were not included in his conveyance, nor in a more particular description from which he prepared his instructions(l).

To come to a right conclusion on this branch of our subject, we must be informed that an acre does not always contain the same superficial quantity of land. The word acre at first denoted, not a determined quantity of land, but any open ground or field. It afterwards signified a measured portion of land, but the quantity varied, and was not fixed until the statute(1) de terris mensurandis(m), according to which an acre contains one hundred and sixty square perches; so that every acre is a superficies

<sup>(</sup>i) Clifford v. Laughton, Toth. 83.

<sup>(</sup>k) Tyler v. Beversham, Rep. temp. Finch, 80; 2 Ch. Ca. 195. See Gibson v. Smith, Barnard. Ch. Ca. 491.

<sup>(1)</sup> Calverley v. Williams, 1 Ves. jun. 210.

<sup>(</sup>m) 33 Edw. I.; and see 24 H. VIII. c. 4; 2 Inst. 737; Co. Litt. 69 a; Spelm. Gloss. v. Acra, particata, terræ, pertica, pes forestæ, roda terræ. Cow. Interp. v. Acre.

<sup>(</sup>I) Probably the defendant had purchased without notice from the first purchaser.

<sup>(</sup>I) It was formerly holden not to be a statute, but only an ordinance. Stowe's case, Cro. Jac. 603; but this has since been overruled. Rex v. Everard, 1 Lord Raym. 638.

of forty perches long, and four broad; or in that proportion, be the length or breadth more or less. The length of the perch was, previously to the statute of Edward, fixed at five yards and a half, or sixteen feet and a half, (\*) by the statute called compositio ulnarum et perticarum(n), and the act of Edward must of course be construed with reference to this standard. Lord Kenyon seems to have thought it impossible to contend, that a custom should prevail that a less space of ground than an acre should be called an acre(o); but in several places the perch is measured with rods of different lengths, and notwithstanding Lord Kenyon's dictum, consuetudo loci est observanda(p), so that a greater or less space of ground than a statute acre may, in compliance with the custom of the place where the land lies, be called an acre. In some places the perch is measure by a rod of twenty-four feet, in some by one of twenty feet(q), and in others by one of sixteen feet(r). And we are now to inquire in what cases the custom of the country in this respect shall or shall not prevail.

In adversary writs the number of acres are accounted according to the statute measure(s), but in fines, and common recoveries, which are had by agreement and consent of parties, the acres of land are according to the customary and usual measure of the country, and not according to the statute(t).

(n) See 4 Inst. 274.

(o) Noble v. Durell, 3 T. Rep. 271; and see Hockin v. Cooke, 4 T. Rep. 314; Master of St. Cross v. Lord Howard de Walden, 6 T. Rep. 338.

(p) 6 Rep. 67. a.

- (q) Crompt. on Courts, 222, who cites a case in the Exchequer, related to him by one of the Barons; and also 47 E. III. [fo. 18 a, pl. 35;] and see Barksdale v. Morgan, 4 Mod. 185.
  - (r) Co. Litt. 3 b. See Dalt. c. 112, s. 25.
  - (s) Andrew's case, Cro. Eliz. 476, cited.
  - (t) Sir John Bruyn's case, 6 Co. 67 a, cited; Waddy r. Newton, (\*325)

So, which is more to our present purpose, where a man (\*)agrees to convey(u), or actually conveys(x) any given mumber of acres of land, which are known by estimations or limits, there the acres shall be taken according to the estimation of the country where the land lies, be they more or less than the measure limited by the statute; for they pass as they are there known, and not according to the measure by statute.

But if a man possessed of a close containing twenty acres of land by estimation, which is not eighteen, grant ten acres of the same land to another, there the grantee shall have ten acres according to the measure fixed by the statute, because the acres of such a close are not known by parcels, or metes and bounds, and so this case differs from the one immediately preceding it(y). And it is said, that if one sells land, and is obliged that it contain twenty acres, the acres shall be taken according to the law, and not according to the custom of the country(z).

But the law upon this subject is altered by an Act of the 5th of the late King, intituled, "An Act for ascertaining and establishing Uniformity of Weights and Measures." After providing that(a) the straight line or distance between the centres of the two points in the gold studs in the straight brass rod now in the custody of the clerk of the House of Commons, whereon the words and figures, "standard yard, 1760," are engraved,

<sup>8</sup> Mod. 276. See Floyd v. Bethill, 1 Roll. Rep. 420, pl. 8; and see Treswallen v. Penhules, 2 Rolle's Rep. 66; 12 Vin. 240.

<sup>(</sup>u) Some v. Taylor, Cro. Eliz. 665.

<sup>(</sup>x) 47 E. III. 18 a, pl. 35; 6 Co. 67 a; Morgan v. Tedcastle, Poph. 55; Floyd v. Bethill, 1 Rolle's Rep. 420, pl. 8; Andrew's case, Cro. Eliz. 476, cited.

<sup>(</sup>y) Morgan v. Tedcastle, Poph. 55.

<sup>(</sup>z) Wing v. Earle, Cro. Eliz. 267.

<sup>(</sup>a) S. 1, c. 74.

shall be the original and genuine standard of that measure of length or lineal extension called a yard; and that all (\*)measures of length shall be taken in parts or multiples, or certain proportions of the said standard yard; and that one third part of the said standard yard shall be a foot, and the twelfth part of such foot shall be an inch; and that the pole or perch in length shall contain five such yards and a half, it enacts, that(b) all superficial measure shall be computed and ascertained by the said standard yard, or by certain parts, multiples or proportions thereof; and that the rood of land shall contain 1,210 square yards according to the said standard yard; and that the acre of land shall contain 4,840 such square yards, being 160 square perches, poles or rods; and that(c) from and after the 1st day of May 1825, all contracts, bargains, sales and dealings which shall be made or had within any part of the United Kingdom of Great Britain and Ireland, for any goods, wares, merchandise, or other thing to be sold, delivered, done or agreed for by measure, where no special agreement shall be made to the contrary, shall be deemed, taken and construed to be made and had according to the standard measures ascertained by this Act; and in all cases where any special agreement shall be made with reference to any measure established by local custom, the ratio or proportion which every such local measure shall bear to any of the said standard measures shall be expressed, declared and specified in such agreement, or otherwise such agreement shall be null and void: and it is then enacted that(d) the several statutes, ordinances, and acts and parts of the several statutes, ordinances and acts thereinafter mentioned and specified, so far as the same relate to the ascertaining or establishing any standards of measures, or to the establishing or

<sup>(</sup>b) S. 2. (c) S. 15.

<sup>(</sup>d) S. 23, sec 6 Geo. IV. c. 12.

(\*)recognizing certain differences between measures of the same denomination, shall from and after the 1st day of May 1825, be repealed; and the enumeration includes the statutes or ordinances before mentioned in this section, which are therefore repealed.

This Act determines what now in law is the superficial quantity of an acre of land. A question will no doubt arise, whether s. 15-applies to contracts for land under the words "or other thing to be sold," or whether those words are not to be construed ejusdem generis with the preceding words, which are "goods, wares, merchandise." At all events, the section applies only to sales by measure. But wherever a purchaser is under a contract entitled to statute acres, the measure will be regulated by this Act.

(\*328)

# (\*)CHAPTER VII.

OF THE TITLE WHICH A PURCHASER MAY REQUIRE.

- I. A PURCHASER before the late Act of 3 & 4 W. 4, c. 27, had a right to require a title commencing at least sixty years previously to the time of his purchase; because the old statute of limitations(a)(I) could not in a shorter period confer a title. In Paine v. Meller(b), Lord Eldon was of opinion, that an abstract not going farther back than forty-three years, was a serious objection to the title(205).
- (a) 32 Hen. VIII. c. 2; 21 Jac. I. c. 1. Vide post; and see Barnwell v. Harris, 1 Taunt. 430.
  - (b) 6 Ves. jun. 349. See Robinson v. Elliott, 1 Russ. 599.
- (I) The Courts however were so anxious to protect a long possession, that no plaintiff was entitled to so little favor as a plaintiff in a writ of right. See Charlwood v. Morgan, Baylis v. Manning, 1 New Rep. 64, 233; Maidment v. Jukes, 2 New. Rep. 429.
- (205) In Sergeant v. Ballard, 9 Pick. 251, the plaintiffs claimed a right of dockage upon the land of the defendant. It was claimed as a prædial service due from the estate of the defendant to the estate of the plaintiffs; and said the court, Putnam J. "it is analogous to the right of watering cattle, conducting water, a right of way, of pasturage, of digging for metals, &c. and a great many other rights and easements, which may be acquired by grant, and by other means in the land of others." The jury at the trial were instructed, that in order to establish the plaintiff's claim, it was not necessary for them to produce any deed, or to prove that any ever existed; the rule being, "that twenty years' occupation alone is sufficient to ground a presumption that the occupation began in virtue of some compact between the parties; but it is to be applied only to cases where the legal qualities of such right are proved to exist. One is, that the occupation must be uninterrupted by the owner of the land; another is, that the occupation must be really adverse, and not by any (\*329)

Even sixty years were not sometimes sufficient. For instance, if it might reasonably be presumed from the

permission, license, or indulgence of the owner." One ground for a new trial assigned was because the instructions were erroneous; but the court considered the instructions of the chief Justice upon the point of occupation, very proper. Putnam, J. observed, "We cannot suppose (as was contended for the plaintiff's), that the mere use of the easement for twenty years is conclusive of the right; nor do we think that was the meaning of Story, J. in Tyler v. Wilkinson, 4 Mason, 402.-His words were 'by our laws, upon principles of public convenience, the term of twenty years of exclusive uninterrupted enjoyment has been held a conclusive presumption of a grant of right.' He could not have intended an enjoyment which had been by the favor and at the will of the owner for twenty years. The chief Justice further instructed the jury, ' that the plaintiffs could not join the period of the occupation of Governor Hutchinson, before the revolution, to their own subsequent occupation, because the occupation was interrupted from 1774 to 1780. Such an interruption would be what the civilians call a usurpation; Ayl. Civ. Law. 321, 324; which is a discontinuance given to prescription, in point of time and possession, 'for upon a commencement of usurpation, prescription is destroyed or annihilated, and must begin again;' which usurpation may be by "an extra judicial denunciation or claim of right," and especially "by a contestation of suit."

But the time which an ancestor possessed may be extended and allowed to his heirs; and the same rule applies to buyers and sellers. "Inter venditorem quoque et emptorem conjungi tempora." Just. instin. lib. 2. tit. 6. s. 8. All that would be required by the possessor would be, evidence that the possession had been legally continued from one owner to another. It was therefore a correct instruction which was given by the chief Justice, that the plaintiffs could not lap on Governor Hutchinson's time to Parson's, because of the interruption from 1774 to 1780. But the plaintiffs might avail themselves of the continued possession of their ancestors. And if Hutchinson acquired the right before he went away in 1774, it would have passed with the estate in virtue of the confiscation and the deed of the commonwealth to Sergeant and Parsons. But the difficulty of the case on the part of the plaintiffs, is as to the character of the occupation, whether it were adverse, or by favor. The plaintiffs have the burden of proof. If they leave it doubtful they are not to prevail. They must not only prove the using for twenty years, which is here the 'tempus longum,' but that it was continued, uninterrupted and adverse, that is, under a claim of right; the owner acquiescing. Dedications of ways do not always rest upon

contents of the abstract, that estates-tail were subsisting, the purchaser might demand the production of the prior title. The statutes of limitation could not in such case be relied on; remainder-men having had distinct and successive rights, upon which at least the statute of James could only begin to operate as they fell into possession. It might have been thought in the common case of a man claiming by descent, a reversion expectant upon particular estates created by his ancestor's will, that a writ of right would not lie after sixty years from his ancestor's death, although the particular estates had but (\*)recently determined. But however this might be, the

length of possession, for in 3 Bing. R. 447, the question left to the jury was whether the thorough-fare had been used with the consent of the owner of the soil, and not for what length of time. A parol dedication is good, and generally the only one made; and although there is no grantee to take, it vests in the public, and is different from ordinary grants, and is construed upon principles to suit the nature of the case; they are similar to the case where a man lays out a street or highway over his own land, where there is no grantee of the easement, yet it takes effect as a grant to the public use, who have the right of passage through, not the absolute property. White v. The City of Cincinnati, 6 Peter's R. 432. So, in the case of Wyman v. The Mayor of N. Y. 11 Wend. R. 486, where a vendor sold lots according to the city map on which his estate was laid down as divided into blocks, streets, &c. held: that he impliedly granted the right or privilege to the purchaser of having such streets, &c.:-and where the conveyance itself bounds the lot upon a a street of a particular width, or as lying within a certain distance from the street, the dimensions and locality of which are described with sufficient certainty in the deed, and the grantor is the owner of the land upon which the supposed street is located, the grant of the privilege of such a street may well be implied. A similar implication arises when a conveyance is made with reference to a map or town plot on which the streets are laid down. In the case of Lewis street, 2 Wend. R. 472, "the principle was established, that in the city of New-York the purchasers of lots bounded upon streets not yet opened, are not subject to any assessment for opening such streets, to pay the owner for the value of the land, the presumption being that an enhanced price was paid for the lots, in consideration of being upon a street or streets. S. P. 8 Wend. 85. (\*330)

objection still remained, for an ejectment might have been brought at any time within twenty years after the estate fell into possession.

So, if an abstract begin with a conveyance by a person who is stated to be heir at law of any person, the purchaser may require proof of the ancestor's intestacy.

To pursue this point is, in this place, impracticable, so numerous are the cases in which counsel are compelled to require the production of the prior title.

But the law is altogether altered by the 3 & 4 Will. 4. c. 27(c), which limits the general time to recover to twenty years, with a saving of ten years for persons under disability, but not to exceed in any case forty years, although the ten years are not expired. The Act allows no further time for successive disabilities, and makes the bar of the tenant, in fact, extend to all whom he might have barred. This will ultimately tend to shorten abstracts considerably, and in the result forty years will probably be considered the proper period instead of sixty for an abstract to extend over, but still cases must frequently arise where it will be necessary to call for an earlier title. As fines are abolished, a short bar, as formerly, cannot now be made.

Of course a purchaser may, after notice of a defect in the title, by his conduct wave the objection; but Lord Eldon has determined, that where an abstract is laid before counsel, who approves the title, his approbation is not to be taken as against the person consulting him, as a waver of all reasonable objections. The Court cannot compel a specific performance upon the ground of an opinion which it may think wrong. The purchaser may either take an opinion from some other counsel, or the (\*)one first consulted may correct his error in a further

<sup>(</sup>c) See post, for a full abstract of the Act.

opinion(d). This, it may be observed, was always the understanding of the Profession.

The right to a good title is a right not growing out of the agreement between the parties, but which is given by law. A purchaser, therefore, may wave his right, by concluding an agreement after he has full notice that he is not to expect a title beyond a limited period. That may be matter of notice and not of contract(e). And the vendor may of course stipulate that the purchaser shall accept the title such as it is(f).

II. Under this head we must consider the much agitated point, whether a purchaser of a leasehold estate can insist upon the production of the lessor's title.

The general practice of the Profession is to call for an abstract of the title, but a lessee is not often able to comply with the demand. At the time the lease is granted, the title is rarely investigated, or even thought of; and a lessor cannot be advised voluntarily to submit his title to the examination of strangers. As my Lord Eldon remarked(g), the Newcastle case is a good lesson upon this subject of production. The corporation produced their charters to satisfy curiosity; some persons got hold of them, and the consequence was, the corporation lost 7,000l. a year.

The numerous cases in the books where lessees, and persons claiming under them, have been evicted on account of defects in the titles of their lessors, strongly evince the danger of taking a lease without investigating the landlord's title. No title can be depended upon, (\*)however long the estate may have been in the same

<sup>(</sup>d) Deverell v. Lord Bolton, 18 Ves. 505.

<sup>(</sup>e) See 3 Mer. 64.

<sup>(</sup>f) Wilmot v. Wilkinson, 6 Barn. & Cress. 506.

<sup>(</sup>g) 8 Ves. jun. 141.

<sup>(\*332)</sup> 

family. There may be a defect in a settlement, or the person in possession may have a partial estate only, with a power of leasing. All the leases of the Pulteney estate were set aside on account of a power of leasing not having been duly pursued: nor is this the only estate of which the leases have been vacated. Besides, without an abstract of the title, a purchaser cannot even ascertain that the lessor had not mortgaged the estate previously to granting the lease, in which case (as against the mortgagee) the lessee, and consequently any purchaser from him, would be a mere tenant at will(h); and his only remedy would be either to redeem the mortgage, or to bring an action on the lessor's covenant for quiet enjoyment.

A lessee is a purchaser pro tanto, and it should therefore seem that he is not only entitled to call upon the lessor for an inspection of his title, but would not meet with any favor if he neglected to do so; for no one's misfortune is so much slighted by the courts as his, who buys a thing in the realty, and does not look into the title(i). In Keech v. Hall(j), Lord Mansfield appears to have taken it for granted, that a lessee has a right to examine the title deeds. The case of Gwillim v. Stone(k), seems to lean the other way, although there, the plaintiff appears to have mistaken his remedy, and the decision in effect only was, that a man entering under an agreement for a lease, before the lease is granted, cannot call upon the other party to reimburse him his loss in case a title cannot be made: although certainly Mr. Justice Lawrence seems to have thought, that the mere agreement to

<sup>(</sup>h) Keech v. Hall, Dougl. 21.

<sup>(</sup>i) See Roswell v. Vaughan, Cro. Jac. 196; and Lysney v. Selby, 2 Lord Raym. 1118.

<sup>(</sup>j) Dougl. 21; and see Waring v. Mackreth, Forr. Ex. Rep. 129; 11 Ves. jun. 343.

<sup>(</sup>k) 3 Taunt. 433.

(\*)grant the lease did not warrant an implied agreement to make a good title, or to deliver an abstract.

In a later case(l) Gibbs, C. J. thought that at nisi prius, that the defendant was not bound to deliver an abstract under a bare agreement to grant a lease for twenty-one years; and Mr. Justice Heath, after instancing the case of leases for three lives, granted some years since in Devonshire, by a Duchess of Bolton, who was mere tenant for life, but assumed to have a power of leasing, and received fines to the amount of 29,000l. observed, that nevertheless it had never yet been heard of, that a tenant for life was asked to show his title to lease. The instance quoted shows the strong necessity of the title being produced; and there is no instance in which a man acting under good advice, accepts a title from a tenant for life, without the production of the settlement under which he claims. However, in this case, the Court considered that the cause originated in a dispute between the two attornies, and the Judges expressed their desire not to decide the point, without affording an opportunity for a review of their judgment. But in the later case of Roper v. Coombes(m), where the agreement was to grant a lease for a large premium, the contract was considered to be for the sale of a lease, and as the intended lessor had no right to grant it, the other party was allowed to recover back his deposit.

In the last equity case on this subject, where the agreement was made to take a lease for twenty-one years at rack-rent, the Master of the Rolls decided, that the intended lessor, who was plaintiff, could not enforce a specific performance, without producing the original lessor's title(n). But it still remains undecided,

<sup>(1)</sup> Temple v. Brown, 6 Taunt. 60.

<sup>(</sup>m) 6 Barn. & Cress. 534.

<sup>(</sup>n) Fildes v. Hooker, 2 Mer. 424; Lord Ossulston v. Deverell, 26 May 1818, MS.

<sup>(\*333)</sup> 

(\*) whether a lessee can, as plaintiff, call for the original lessor's title.

The argument generally urged against a purchaser's right to call for the lessor's title is, that a lessee is seldom able to produce the title; and, therefore, on the ground of convenience, a purchaser must be presumed to know this circumstance, and to buy, subject to an implied condition, not to call for the freehold title. But the answer to this is, that the lessor's title is now generally required; and where the vendor cannot produce the title, it is usual to state the fact in the particular or agreement. Therefore, where that statement is omitted, it is fair to presume that the vendor is in possession of the title. There can be no inconvenience in establishing the purchaser's right to call for the freehold title; for the vendor has it in his power to prevent the claim by an express stipulation.

Of course, if a vendor of a leasehold estate be unable to procure the lessor's title, equity cannot assist the purchaser(o), unless he will dispense with the production of the title to the freehold.

The question under consideration arose in a recent case in the Court of Chancery; and Lord Eldon avoided deciding the abstract point, although he certainly appears to have thought that the better rule would be, that the purchaser is, in the absence of an express stipulation to the contrary, entitled to the production of the lessor's title. He intimated, however, that if ever it should be his duty to decide a question so important, he would call in the Judges to his assistance.

The case before Lord Eldon has decided that the vendor cannot demand a specific performance if the purchaser can show that the title to the freehold is not good, or that there are any incumbrances on it; nor will equity (\*)afford its aid against the purchaser, where the nature

<sup>(</sup>o) Vide supra, p. 208.

of the leasehold title is misrepresented. The facts were these: the interest was described as fifty years, the residue of a term free from incumbrances, whereas it appeared that there were only sixteen years to come of the old lease, granted by Sir Richard Grosvenor in 1722, and the residue of the fifty years was granted by the trustees of Lord Grosvenor in 1791, as a reversionary term for thirty-four years. It appeared, that in 1785, the estate in question was charged with jointures, mortgages, &c. Lord Eldon held, that in these cases a purchaser should at least know accurately what he is buying; that in the case before him, the title produced did not correspond with that contracted for; and that there was a wide difference between the residue of a lease that has existed for a century with possession under it, and a small residue of an old term, and a reversionary lease granted by persons whose title from the first lessor is not deduced. He also thought that he was bound to look at the incumbrances, and therefore dismissed the bill, but without costs(p). But when it is stated that the property is held under two leases at one rent for a stated term, it must be understood that the leases are consecutive ones(q).

The general point was decided in favor of the purchaser's right in the case of Purvis v. Rayer(r) in the Exchequer. An agreement was entered into on the . (\*)15th May 1819, between John Goldsborough Ravenshaw (as the agent of Purvis) of the one part, and

<sup>(</sup>p) White v. Foljambe, 11 Ves. jun. 337; Deverell v. Lord Bolton, 18 Ves. 505; and see Radcliff v. Warrington, 12 Ves. jun. 326; Lady Saltonn v. Philips, sittings after T. T. 1813, cor. Lord Ellenborough, where a purchaser recovered his deposit, because the seller claimed his lease subject to Lord Grosvenor's incumbrances, and had stated that the lease was only subject to the ground-rent, although he had not undertaken to produce the landlord's title. See 9 Price, 515.

<sup>(</sup>q) Spratt v. Jeffery, 10 Barn. & Cress. 249.

<sup>(</sup>r) 28 July 1821, MS.; S. C. 9 Price, 488.

<sup>(\*336)</sup> 

William Rayer of the other part; whereby Ravenshaw agreed to sell, and Rayer agreed to purchase a house in Bath, held for the remainder of a term of years under the corporation of Bath and the late Richard Atwood, at the sum of 1,500l.; an abstract to be made and delivered by Purvis, and the assignment to be at the expense of Rayer. The purchase-money to be paid on or before Midsummer, when the deeds were to be signed. The ground-rent and all outgoings to Midsummer to be paid by Purvis, from whence the same were to be paid by Rayer. The bill was filed by the seller, and the title was referred to the Master, who reported that the plaintiff could not make a good title to the said leasehold premises. The report was grounded on the non-production of the lessor's title. The plaintiff excepted to the report. The Chief Baron overruled the exception. His Lordship observed that the question was, whether, when a man sells a leasehold estate, he could compel the purchaser to take it without showing him his title. White v. Foljambe was the first case on this point. There was no case that went the length of showing that a lessor is not bound to show his title. This was a lease from a corporation; and the general rule is, that where a vendor offers any thing for sale, the vendee is entitled to have the thing he buys with a moral certainty that he has the thing he buys. If a man sell an inheritance, he must show a title to the inheritance: so if a life estate. Then what is the difference where a lease is sold? It is said, however, that this is an anomalous case; but the law has not said so, nor has it been so considered in any of the decided cases. Then it is objected, that a lessor has not the means of compelling the inspection of his lessor's title; that is true, but furnishes no ground for an exception. A lessee may (\*)insist on looking into his lessor's title, or that he should produce it; but if he omits to do so, is that any reason why the vendee of a lease should be deprived of those

advantages? Another course is, to state in the advertisement that you cannot show the title. Therefore, though after the lease is granted the lessee cannot compel the production of his lessor's title, there is no reason why the vendee should be put to any risk. Then is there a good title here; the lease is made in 1774; does the length of time make the lease good? Suppose it had been made by a tenant for life; a tenant for life might live for forty-five years; forty-five years possession would not be good evidence of a title to the inheritance; but then it is said, this was a lease by a corporation. His Lordship was of opinion that there might be circumstances which might make an alteration; but here there was no act of ownership prior to 1774, no prior leases. A tenant for life might have conveyed in fee to a corporation, but on the death of the tenant for life, the estate would cease. This case, therefore, did not differ from the case of a lease from an individual.

If a purchaser of a leasehold estate had notice, at the time he entered into the contract for purchase, of the vendor's inability to produce the lessor's title, he would not afterwards be allowed to insist on its production. Wherever, therefore, a vendor of a leasehold estate has not an abstract of the lessor's title, this circumstance should be mentioned in the particulars of sale, if sold by auction; or in the agreement, if sold by private contract. And if the purchaser agree to accept a proper assignment, without requiring the lessor's title, he will at law be compelled to pay the price, although the lessor's title prove to be bad(s). And a purchaser of an estate (\*)held under a bishop's lease, cannot call for the lessor's title(t).

It seems formerly to have been thought, that a plaintiff

<sup>(</sup>s) Spratt v. Jeffery, 10 Barn. Cress. 249.

<sup>(</sup>t) Fane v. Spencer, 2 Mer. 430.

<sup>(\*338)</sup> 

in an ejectment for a leasehold estate, could not recover unless the original lease and all the mesne assignments were proved; but this rule has been relaxed, and where the possession had been uniform, the jury will be recommended to presume any old assignments which have been lost(u). It cannot, however, be laid down as a general rule, that a purchaser of a leasehold estate can safely accept the title where any of the mesne assignments have been lost, although he might be able to recover in ejectment, if he actually did purchase. Every case of this nature must depend upon its own particular circumstances(x).

If the title deeds are lost, the seller must furnish the purchaser with the means of showing what were the contents of the deeds, and of proving that they were duly executed, even where the deeds are accidentally destroyed by fire after the contract is made(y).

With respect to the title to renewable leaseholds, great difficulty constantly occurs. All public bodies who grant renewable leases, require the old lease to be given up before they will grant a new one; and when they once obtain possession of a surrendered lease, they will not part with it, or permit a copy of it to be taken. When the lessee sells, he produces an abstract of the subsisting lease and subsequent instruments. Now this is a title which it is impossible to accept, however willing the purchaser may be, and although he may have waved calling for the lessor's title. Every lease is stated to be granted in consideration of the surrender of the former lease, and by means of this reference (\*)the chain of title is kept up. The reference in the last lease to the one immediately preceding, is notice of it to the purchaser, and that again is notice of the one before

<sup>(</sup>u) Earl v. Baxter, 2 Blackst. 1228. See 11 Ves. jun. 350.

<sup>(</sup>x) Vide post. Hillary v. Waller.

<sup>(</sup>y) Bryant v. Busk, 4 Russ, 1. vol. 1. 52

that, and so on to the first lease. And if in any of these leases the lessee is described as devisee under a will, or there is any thing to lead the mind to a conclusion that the lessee is not absolutely entitled, the purchaser will be liable to the same equity as the lessee was subject to, although he, the purchaser, had no other knowledge of the fact, than the mention in the lease of the surrender of the former lease, equity deeming that sufficient to lead him to inquire into the title(z). Harsh as this rule may seem, it is quite consistent with the general principles of equity, and is imperiously called for in this case, because public bodies generally renew with the person having the legal estate, and seldom suffer any trusts to appear on the lease, lest they should be implicated in the execution of them.

Although a purchaser buys with full notice that a title cannot be made without the consent of a third person, yet it lies on the seller and not on the purchaser to obtain the consent. It cannot be inferred that the seller only agreed to part with his interest in the estate as far as he was able to do so(a).

III. To enable equity to enforce a specific performance against a purchaser, the title to the estate ought, like Cæsar's wife, to be free even from  $\operatorname{suspicion}(b)$ ; for it would be an extraordinary proceeding for a court of equity to compel a purchaser to take an estate which it cannot warrant to  $\operatorname{him}(c)$ . It hath, therefore, become a settled and invariable rule, that a purchaser shall not be compelled (\*)to accept a doubtful  $\operatorname{title}(d)(206)$ ; neither will

(z) Coppin v. Fernyhough, 2 Bro. C. C. 291.

(c) Heath v. Heath, 1 Bro. C. C. 147.

<sup>(</sup>a) Lloyd v. Crispe, 5 Taunt. 249; Mason v. Corder, 2 Marsh. 332; 7 Taunt. 9.

<sup>(</sup>b) See 2 Ves. 59.

<sup>(</sup>d) Marlow v. Smith, 2 P. Wms. 198; Mitchel v. Neale, 2 Ves.

<sup>(206)</sup> See Butler v. O'Hear, 1 Des. 382. M'Comb v. Wright, 4 (\*340)

he be forced to take an equitable title(e) nor will a case be directed to the Judges as to the title unless, the purchaser be willing that it should(f); and even if a case should be directed, and the Judges were to certify in favor of the title, yet a specific performance would not be decreed unless the Court itself were satisfied of the equitable as well as the legal title of the vendor(g). And although the Judges certify in favor of the title, and there is no equitable objection to it, yet if the point of law is doubtful, the purchaser may require another case to be directed, which it seems will not be sent back to the same court(h). If exceptions be taken to the Master's report in favor of the title, and the Court think the title a doubtful one, the bill may upon further directions be dismissed without either overruling or allowing the exceptions(i).

And even the house of Lords, sitting as a court of equity upon appeal, will not in all cases decide the point, but if they think it a doubtful one will discharge the

679; Shapland v. Smith, 1 Bro. C. C. 74; Cooper v. Denne, 4 Bro. C. C. 80; 1 Ves. jun. 565, S. C.; Crewe v. Dicken, 4 Ves. jun. 97; Rose v. Calland, 5 Ves. jun. 186; Roake v. Kidd, ibid. 647; Wheate v. Hall, 17 Ves. jun. 80; Sloper v. Fish, Rolls, 29 July 1813; 2 Ves. & Bea. 145; Jervoise v. Duke of Northumberland, 1 Jac. & Walk. 559; Price v. Strange, 6 Madd. 159.

- (e) Cooper v. Denne, ubi sup.; and see 2 Ves. jun. 100; and infra.
- (f) Reake v. Kidd, ubi sup.; Sharp v. Ardcock, 4 Russ. 374.
- (g) Sheffield v. Lord Mulgrave, 2 Ves. jun. 526.
- (h) Trent v. Hanning, 10 Ves. jun. 500.
- (i) Willcox v. Bellaers, 1 Turn. & Russ. 491.

Johns. Ch. Rep. 659. Kelley v. Bradford, 3 Bibb, 317. But where a purchaser proceeds in the treaty for a purchase, after he is acquainted with the title, and the nature of the tenure, and does not object to it, he will be bound to fulfil his contract; though a court of equity might give some relief, if, ultimately, the title should turn out to be really bad. Roach v. Rutherford, 4 Des. 126, 135. See also, Beverley v. Lawson's heirs, 3 Munf. 317, 338. Mayo v. Purcell, 3 Munf. 243.

purchaser from the contract, with costs(k). It is, however, to be regretted that such a rule should have been

adopted.

The doubt generally turns upon a point of law, but (\*)the rule equally applies to other cases. Therefore where a testator, who appeared to be seised of the entirety of an estate, devised his undivided moiety, or half part of it, and all other his shares, proportions and interests if any therein; and no evidence appeared that he had not the entirety, and the words were sufficient, if he had, to pass it; Lord Eldon was of opinion that the title was good; but he was also of opinion that this was not a reasonably clear marketable title, with that doubt as to the evidence of it, which must always create difficulty in parting with it, and therefore he refused to force the title on a purchaser(l).

So there are many cases in which a jury will collect the fact of legitimacy from circumstances, in which it might be attended with so much reasonable doubt, that equity would not compel a purchaser to take it merely because there was such a verdict. The Court ought to weigh, whether the doubt is so reasonable and fair, that the property is left in his hands not marketable(m).

Whether where an action is brought against a purchaser for non-performance of an agreement, a court of law will act upon this doctrine, is doubtful. In a case before Lord Kenyon at nisi prius(n), where an objection was made to the title, his Lordship said he would not then determine the point, nor was it necessary to do so. He thought it a question of some nicety; but whether it was or not, he thought it equally a defence to the action. When a man

<sup>(</sup>k) Blosse v. Clanmorris, 3 Bligh, 62.

<sup>(1)</sup> Stapylton v. Scott, 16 Ves. jun. 272. See 1 Ves. & Beam. 493; and see and consider Hartley v. Smith, 1 Buck, 368.

<sup>(</sup>m) Per Lord Eldon. See 8 Ves. jun. 428.

<sup>(</sup>n) Hartley r. Peahall, Peake's C. 131; Wilde r. Fort, 4 Taunt. 334. (\*341)

buys a commodity, he expects to have a clear indisputable title, and not such a one as may be questionable, at least, (\*)in a court of law(1)(207). No man is obliged to buy a lawsuit; and a verdict was given for the purchaser. But in a later case(o), where at law the same argument was urged on behalf of a purchaser who was plaintiff, Lord C. J. Gibbs said, it was intimated that if any doubt could be cast on the title of the vendor, the plaintiff would be entitled to recover back his deposit. Now, if he had gone into a court of equity, the Chancellor would not, perhaps, have obliged an unwilling purchaser to ratify the contract. But if he come into a court of law to recover the deposit, on the ground of an insufficient title, he must abide by the decision of that court, and that is the difficulty which the party had brought upon himself by coming into a court of law. This seems to be the true rule.

In a late case, where the estate was sold without any notice, that it was recently allotted under an inclosure act, and it appeared that the commissioners had not made their award, and the act contained no clause authorizing a sale before the award; Lord Ellenborough held, that the purchaser was warranted in refusing the title (p). But if the purchaser is at the time of the contract aware that the estate is in a progressive state of inclosure, and there is no ground to suppose that the commissioners will vary the allotments, assuming their power to do so, the pur-

<sup>(</sup>o) Romilly v. James, 1 Marsh. 600.

<sup>(</sup>p) Lowndes v. Bray, Sitt. after T. Term, 1810; Cane v. Baldwin, 1 Stark. 65; Farrer v. Billing, 2 Barn. & Ald. 171.

<sup>(</sup>I) This expression seems to refer to the question, whether equitable objections to a title are a defence at law. Vide supra, p. 243.

<sup>(207)</sup> See Roach v. Rutherford, 4 Des. 133.

chaser will be compelled to take the title although the award is not executed(q).

(\*)Where an act of bankruptcy has been committed, the purchaser cannot be compelled to take the title, although the vendor swear that he owes no debt upon which a commission can issue, and the purchaser cannot disprove the statement. The ground of this determination was, the impossibility of ascertaining that there was not such a debt as would support a commission(r). And upon the same principle, a purchaser who has become bankrupt cannot compel a conveyance of the estate to him; because he cannot satisfy the vendor that he will be entitled to retain the purchase-money(s).

So, where an estate is sold subject to a rent, which, although not so stated, appears to be only part of a larger rent charged on that and other property, the purchaser will not be bound to take the title, although for many years the apportioned rent has been received (208): an apportionment by deed must be shown. It is the duty of the vendor to give the purchaser a complete formal discharge of all the further rent that the house was ever liable to. Although an apportionment may be presumed, vet, as Mr. Justice Chambre observed, the question here is not what may be presumed, but whether a purchaser is compellable to accept a purchase, where his title rests only on presumption, which may be rebutted by other evidence. And Lord Chief Justice Mansfield said, that a court of equity would not decree a specific performance in a case like this, unless the seller could procure the

<sup>(</sup>q) Kingsley v. Young, MS.; S. C. 17 Ves. jun. 463, affirmed on an appeal by Lord Eldon. The act authorized a sale before the award.

<sup>(</sup>r) Lowe v. Lush, 14 Ves. jun. 547; Cann v. Cann, 1 Sim. & Stu. 284.

<sup>(</sup>s) Franklin v. Lord Brownlow, 14 Ves. jun. 550.

<sup>(208)</sup> See Ten Broeck v. Livingston, 1 Johns. Ch. Rep. 357. (\*343)

ground-landlord to apportion the rent, by joining in an assignment of the lease; in which assignment the apportioned rent should appear(t).

But where an apportioned rent is sold, if the rent is (\*)an apportioned rent, the purchaser cannot object that he will not have the same remedies as if the rent were entire(u).

So where an estate, held under one lease, is sold in lots, and the fact is stated, and it is stipulated that the purchaser of one particular lot is to be subject to the whole of the rent, the other purchasers cannot object to the title, although there is a clause of re-entry on non-payment of the rent contained in the lease(x).

In a case where an estate was sold in lots, and one of the conditions stated that the estate was subject to the perpetual payment of 120l. to the curate of A., but the same and a perpetual annual payment to the hospital of B. were in future to be charged upon and paid by the purchaser of lot 1. only; it was held, that the purchasers of the other lots were only entitled to such an indemnity as could be made by the purchaser of lot 1. to the purchasers of the other lots(y).

Where the estate agreed to be leased was comprised with others in an original lease, under which the lessor had a right to re-enter for breach of covenants, so that the under-lessee might be evicted without any breach on his part, it was held, by Sir John Leach, Vice-Chancellor, that he was not bound to accept the title with an indemnity. His Honor observed, that where a party comes for a specific performance, he desires the Court to give the party

<sup>(</sup>t) Barnwell v. Harris, 1 Taunt. 430.

<sup>(</sup>u) So held by the V. C. in Bliss v. Collins, reported in 4 Madd. 229. See S. C. 1 Jac. & Walk. 426; Walter v. Maunde, 1 Jac. & Walk. 181.

<sup>(</sup>x) Walter v. Maunde, ubi sup.

<sup>(</sup>y) Cassamajor v. Strode, 2 Swanst. 347; 1 Wils. Cha. Ca. 428.

the specific subject. Now here he could not secure the possession of the subject upon the terms agreed upon. But he offers an *indemnity*. The lessee might be evicted, and therefore it was compensation and not indemnity that was offered. I will give you the subject of the contract (\*)not with a sure title, but with a compensation in case of eviction. It was not a case for an indemnity, and the Court could not compel a performance with a compensation(z).

In a late case(a), upon a purchase, it was agreed, that if there should be found any fee-farm rents, or quit-rents, chargeable on the same, an allowance should be made at the rate of thirty years purchase on the amount thereof. It appeared that the estate, with others of great value, was charged with a perpetual rent of forty marks, originally reserved to the Crown; but a similar rent was granted to trustees in fee, in the usual way, out of a part of the estate not sold, of nearly ten times the annual value of the rent, as an indemnity to the other estates against the rent. It was objected, that this charge prevented the seller from making a good title. It was argued, on the part of the seller, that this was the precise case in which a purchaser would be compelled to take a title with an indemnity. Equity looks only to the substantial execution of the contract; and here the rent was not, in substunce, a charge on the land. It was not like the case of a lease, where non-payment of the rent, or non-performance of the covenants, might avoid the estate of the person who was required to accept the indemnity; but this was the simple case of a money payment, which would, of course, be accepted from the owner of the estate exclu-

<sup>(</sup>z) Fildes v. Hooker, 3d April 1818, MS.; 3 Madd. 193; Warren v. Richardson, 1 You. 1.

<sup>(</sup>a) Hays v. Bailey, Rolls, 10 Aug. 1813, MS. vide infra. See Cassamajor v. Strode, 1 Wils. Cha. Ca. 428. (\*345)

sively charged with it, by way of indemnity; and which estate would always be liable to answer any payment made on account of the rent by the persons intended to be indemnified against it. The objection, if allowed, would affect half the titles in the kingdom. It applies (\*)to nearly all the estates which came into the hands of the Crown on the dissolution of the monasteries. Dickenson v. Dickenson(b) was a stronger case; for there the purchaser was compelled to take the title, although the Judge was of opinion, that if, in the event, the fund should turn out deficient for payment of the infant's legacies, he must still have recourse to the estate for the deficiency. The ground of the decision must have been, that there was no chance of the fund proving deficient. Halsey v. Grant(c) is a direct authority in favor of the seller; and there the indemnity fund was not so large with reference to the amount of the charge as the present; and although Horniblow v. Shirley(d), was a case of compensation, and not of indemnity, yet it appears that Lord Alvanley said, that if such an objection was to prevail, a purchaser of a portion of a large estate would always be at liberty to get rid of a contract(e). In the present case, the purchaser did not object to the estate being charged with a fee-farm rent, provided he was paid its value. Here the rent is charged only in point of form; and therefore he can require no allowance. On the part of the purchaser, it was argued, that the clause relied upon, on the other side, was evidence that the purchaser was not to take the estate subject to any rent, unless it could be sold to him; and the estate would always be liable to the fee-farm rent, notwithstanding the indemnity. The Master of the Rolls was of opinion, that the clause in the agreement referred to a rent

<sup>(</sup>b) 3 Bro. C. C. 19.

<sup>(</sup>c) 13 Ves. jun. 73.

<sup>(</sup>d) 13 Ves. jun. 8.

<sup>(</sup>e) 13 Ves. jun. 75.

charging the estate sold only, and not to a rent charging it and other estates; and that the Master was justified in considering the rent as an objection to the title. As to the question of indemnity, his Honor observed, that (\*)Halsey and Grant was certainly a case of indemnity; and Horniblow and Shirley a case of compensation; but he doubted whether the deed executed in order to relieve the estate in question, could be considered such an indemnity as a purchaser ought to be compelled to accept, nor should he decide whether in this case any indemnity could or ought to be given by the vendor against such fee-farm rent. He should leave that to be decided when the cause came on to be heard thereafter.

Upon an appeal to the Lord Chancellor, he affirmed the decision of Sir William Grant, on the ground that the rent in question did not fall within the condition; and his Lordship treated the early cases as not being authorities, and held that a seller was bound accurately to describe what he was selling (f)(209).

In the case of Fildes v. Hooker(g), Sir John Leach, Vice-Chancellor, observed, that the utmost length of indemnity was, that if a good title can be made subject to an incumbrance, the purchaser shall take the title, with a security protecting him against the incumbrance. He did not know that the Court had gone so far, and he should not be disposed to follow such a rule, because the purchaser is entitled to an estate free from incumbrance. It would be difficult to convince him that such a rule was right.

<sup>(</sup>f) M. T. 1821, MS.

<sup>(</sup>g) 3d April 1818, MS.; 3 Madd. 193.

<sup>(209)</sup> Where there was a contract for the conveyance of land, parcel of a large tract, subject to a quit rent, which had not been demanded for above 60 years, such incumbrance, if any, was held to be no objection to a decree of specific performance. Ten Brocek v. Livingston, 1 Johns. Ch. Rep. 357.

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It hath before been observed, that a purchaser will not be compelled to take an equitable title; but this rule does not extend to estates sold before a Master under the decree of a court of equity. For in this case, although the legal estate is outstanding, and cannot be immediately got in, yet if the person seised of the legal estate is a party to the suit, the Court will compel the purchaser to accept the title, and will decree generally that the (\*)legal tenant shall convey, and that the purchaser shall in the mean time hold and enjoy.

And even where the legal estate is vested in an infant, the Court will compel the purchaser to complete his contract on the usual decree, that the infant shall convey when he comes of age, unless he then shows cause to the contrary; and that the purchaser shall in the mean time hold and enjoy.

Thus in a case (h) where, upon sale of an estate before a Master, in pursuance of a decree under Lord Waltham's will, the purchaser objected to the title, on the ground of the legal estate being in an infant; Lord Rosslyn, without the least hesitation, compelled the purchaser to take the title, making his decree for the infant to convey in the usual form; because, as the purchaser bought under the decree, he was bound to accept such a title as the Court could make him(i). And I learn that in a case of this nature, Lord Rosslyn would not sanction an application by the purchaser, at his own expense, for an act of parliament to divest the infant of the legal estate. Nor, if the estate be copyhold, will the Court retain any part of the purchase-money in order to defray the expense of the

<sup>(</sup>h) Ch. MS. See Chandler v. Beard, 1 Dick. 392.

<sup>(</sup>i) But note, a purchaser under a decree will not be compelled to take a doubtful title. See Marlow v. Smith, 2 P. Wms. 198; Shaw v. Wright, 3 Ves. jun. 22; Noel v. Weston, Coop. 138.

fine that would be payable, in case the infant heir should die before he surrendered(k).

But although a purchaser under a decree will be compelled to accept a title of this nature, yet, if he sell the estate, the Court will not enforce a specific performance against the second purchaser.

This was also decided by Lord Rosslyn. The purchaser of Lord Waltham's estate sold the estate to a person (\*)who objected to the title upon the same ground as he had objected to it, and refused to complete the contract. The first purchaser very confidently filed a bill for a specific performance, but Lord Rosslyn dismissed it; because such second purchaser did not buy under the decree, and therefore was not compellable to accept an equitable title(l).

But where the estate is not sold by the Court, although the purchaser agree to go before the Master upon a reference of title in a suit in Court for the administration of the estate, yet he is not bound to take an equitable title(m).

In a case where a seller after the contract died intestate, leaving an infant heir, who filed a bill against the purchaser, praying that he might elect either to complete or abandon the contract; and the purchaser submitted to perform the contract, and paid the purchase-money into court, the Maser of the Rolls refused to pay it out without the consent of the purchaser during the infancy of the heir(n).

In another case, where after a contract for sale the seller died intestate, leaving an infant heir, and his widow,

<sup>(</sup>k) Morris v. Clarkson, 1 Jac. & Walk. 604, n.; 3 Swanst. 558.

<sup>(1)</sup> Powell v. Powell, 6 Madd. 53.

<sup>(</sup>m) Cann v. Cann, 1 Sim. & Stu. 284.

<sup>(</sup>n) Bullock v. Bullock, 1 Jac. & Walk. 603. (\*349)

who was his administratrix, filed a bill for a specific performance against the purchaser and the heir, it was decreed, and a day given to the heir to show cause(o). But the objection, that the purchaser was not bound to accept the title in consequence of the infancy of the heir, was not taken.

The reason why a purchaser under a decree is compelled to take an equitable title seems to be this, that the Court has bound the right of the party in whom the legal (\*)estate is vested, and will not permit him to take advantage of it. This, however, is not the case where the legal estate is in an infant; as it makes part of the decree, that he shall convey when he comes of age, unless he then shows cause to the contrary.

In favor of the rule, by which a purchaser under a decree is compellable to take an equitable title, it may be said, that it facilitates sales under the decrees of the Court; but the injustice of it is too glaring. The decree of a court of equity acts in personam, and not like a judgment at law, in rem; and it is possible that the Court may never be able to compel the person seised of the legal estate to convey it to the purchaser.

But the Acts of the 1 W. 4, to which we have already referred(o), remove most of these anomalies by enabling the Court to make a good legal title. With this view, as we have seen, a tenant for life may convey the inheritance; an infant may convey as if he were an adult; and a committee may convey in the place of the lunatic.

Although an estate is not sold under a decree, and the legal estate appears to be outstanding, and cannot be got in, yet, if the circumstances of the case are such as would induce a court of law, under those grounds upon

<sup>(</sup>o) Holland v. Hill, Rolls, 18 Mar. 1818, MS.; King v. Turner, 2 Sim. 549.

<sup>(</sup>o) Supra, p. 192.

which presumptions are in general raised, to presume a reconveyance, the purchaser will be compelled to take the title(p). Reconveyances have been frequently presumed upon trials at law in favor of justice; but this doctrine was never applied to a contract between a vendor (\*) and purchaser, until the case of Hillary v. Waller, which certainly has not met with the approbation of the bar. The decision has occasioned considerable difficulties in practice. As no man can say where exactly the line is to be drawn, at what period the presumption is to arise, and what circumstances are sufficient to rebut it, each party puts his own construction on almost every case which arises. This, of course, leads to endless discussion and expense, and the very parties in whose favor the doctrine was introduced, ultimately feel how much it would have been to their interest, that the general rule of the Profession had not been relaxed. This rule was, that a vendor was bound to get in all outstanding legal estates, which were not barred by the statutes of limitations. The certainty of the rule amply compensated for any individual hardship which it might sometimes occasion. And now that the time is shortened by the late statute of limitations, there is less room than before for presuming a conveyance of a legal estate against a purchaser(210).

(p) Hillary v. Waller, 12 Ves. jun. 239; Emery v. Growcock, exparte Holman, post. ch. 9, s. 2, div. iv; but see Goodright v. Swymmer, 1 Kenyon, 385; Keene v. Deardon, 8 East, 248; Doe v. Brightwen, 10 East, 583, which show that the circumstance of the equitable estate being in the person who claims the benefit of the presumption, is not sufficient of itself to raise it; and see Barnwell v. Harris, 1 Taunt. 430; Doe v. Calvert, 5 Taunt. 170; Cooke v. Soltau, 2 Sim. & Stu. 154; and see 10 Barn. & Cress. 312; Noel v. Bewley, 3 Sim. 103.

<sup>(210)</sup> In Clark v. Redman, 1 Blackf. R. 379, where the plaintiffs gave to defendant their bond conditioned for making a lawful title upon his payment of the purchase money; held, that the obligors were bound to make a perfect title with a general covenant of warranty. The bond (\*351)

We have seen, that a purchaser cannot be compelled to take a doubtful title; but, nevertheless, he will not be permitted to object to a title on account of a bare possibility; because a court of equity, in carrying agreements into execution, governs itself by a moral certainty: it being impossible, in the nature of things, there should be a mathematical certainty of a good title(211).

Therefore *suggestions* of old entails, or doubts what issue persons have left, whether more or fewer, are never allowed to be objections of such force as to overturn a title to an estate(q).

So where (r), upon a purchase, it appeared that the (\*)estate had been originally granted by the Crown, in which grant there was a reservation of tin, lead, and all royal mines, without a right of entry; yet, as there had been no search made for royal mines for one hundred and

was executed by three; "by which bond, said the court, these three obligors were bound for a good and perfect title, with a general warrantee deed to be executed by them all with their wives. The deed tendered was executed by one and his wife only: defendant was justified in refusing it."

A contract to make "a warranty deed, free and clear of all incumbrances," held, that the construction of such a contract is, that the premises should in fact be free from incumbrances; and where it appeared at the time of the tender of the deed that one C. had an inchoate right of dower in the same, the court considered that this was an existing incumbrance which justified the defendant in refusing to perform the contract on his part. Porter v. Noyes, 2 Greenl. R. 22. And where the plaintiff stipulated to execute a deed with a covenant of warranty, held, that he must have the power to give a deed, which would convey an indefeasible title. Under such a contract a mortgage upon the land is an incumbrance, which will justify the purchaser in refusing the deed. Judson v. Wass, 11 Johns. 11.

<sup>(</sup>q) See 2 Atk. 20, per Lord Hardwicke; and see Lord Braybroke
v. Inskip, 8 Ves. jun. 417; Dyke v. Sylvester, 21 Ves. jun. 126.

<sup>(</sup>r) Lyddal v. Weston, 2 Atk. 19. See Seaman v. Vawdrey, 16 Ves. jun. 390.

<sup>(211)</sup> See Ten Broeck v. Livingston, 1 Johns. Ch. Rep. 357.

eleven years, and, upon examination, the probability was great there were no such mines, and the Crown, for want of a right of entry, could not grant a license to any person to enter and work them, Lord Hardwicke decreed a specific performance.

Again, in a recent case(s), where a man articled for the purchase of an estate, with some valuable mines, and would not complete his contract because the mines were under a common, wherein others had a right of common, and consequently he would be subject to actions for sinking shafts to work the mines; Lord Eldon, after showing the improbability of any obstruction from the commoners, said, that in case such an action were brought, he should think a farthing quite damages enough; and therefore decreed a performance in specie.

This case, like the last, must be considered to have turned on the improbability of the purchaser being disturbed; otherwise it seems to have gone to the utmost verge of the law; for although such trifling damages could only be recovered, yet that would not be a ground for a nonsuit, as was decided in the late case of Pindar v. Wadsworth(t). The estate, therefore, would subject the purchaser to litigation, whenever malice or caprice might induce any of the commoners to commence actions against him.

So a mere suspicion of fraud, which cannot be made out, will not enable a purchaser to reject the title. This was decided by Lord Eldon in a case where, under an exclusive power of appointment, a father appointed to one son in fee; and then the father and his wife and the (\*)son joined in conveying to a purchaser, and the money was expressed to be paid to them all. The title was objected to on the ground of an opinion, by which it

<sup>(</sup>s) Anon. Chan. 7th Sept. 1803, MS.

<sup>(</sup>t) 2 East, 154.

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appeared, that the father first sold the estate, and then the appointment was devised to make a title, and the purchase-deed recited that the contract was made with the father and son. And it was insisted that if the father derived any benefit from the agreement, or even made a previous stipulation that his son should join him in a sale, which there appeared the strongest reason to apprehend, it would have been a fraudulent execution. But Lord Eldon overruled the objection, as it did not appear that the estate sold for less than its value, or that the son got less than the value of his reversionary interest, but merely that he, as the owner of the reversion, acceded to the purchase (u).

If a seller file a bill for a specific performance, and a third party file a bill against him, claiming a right to the estate, the mere fact of the pendency of the latter suit is not a sufficient reason for a Master's stating that a good title cannot be made, but the nature of the adverse claim should be examined and stated(x).

But if any person has a claim upon the estate which he may enforce, a purchaser cannot be compelled to take the estate, however improbable it may be that the right will be exercised. Thus, in the case of Drewe v. Corp(y), the vendor was entitled to an absolute term of four thousand years in the estate, and also to a mortgage of the reversion in fee, which was forfeited but not foreclosed. It was decided, that the purchaser who had contracted for a fee, was not bound to take the term of years. Nor was (\*)he compelled to take the title on the ground of the vendor having a forfeited mortgage in fee of the rever-

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<sup>(</sup>u) M'Queen v. Farquhar, 11 Ves. jun. 467. See post ch. 17; and see Barnwall v. Harris, 1 Taunt. 430; Boswell v. Mendham, 6 Madd. 373.

<sup>(</sup>x) Osbaldeston v. Askew, 1 Russ. 160.

<sup>(</sup>y) Vide supra, p. 298.

sion, although it was evidently highly improbable that any one would ever willingly redeem a forfeited mortgage of a dry reversion expectant upon an absolute term of four thousand years.

So in a late case(z), it appeared that in 1704 the estate was sold with a reservation of salt-works, &c. with a right of entry, and the estate was sold in 1761, and no notice taken of the reservation, and the right had never been exercised; the Master of the Rolls was of opinion that non-user did not in this case raise the inference that the right was abandoned, and consequently the purchaser was entitled to take the objection, and his Honor distinguished this from the case of Lyddal v. Weston(a); first, because it was not alleged that there was no probability of mines, it was rather admitted that there were: secondly, here was the reservation of a right of entry, upon the want of which Lord Hardwicke laid stress in that case. In the case before his Honor, the purchaser chose to consider this not as an objection to the title, but as a ground for compensation, and it was decreed accordingly.

In a case where a close called the Croyle had always been known by that name, and had been possessed by the seller and his ancestors as part of the estate sold, but no mention was made of it in the deeds by name, and all the other lands were particularly described; the Court considered the evidence of title to be merely that of long possession, and held that the purchaser was not bound to accept the title (b).

But where it is established by evidence that a copyhold (\*)estate sold has continually passed and been enjoyed by the description contained in the court rolls, it is not ma-

<sup>(</sup>z) Seaman v. Vawdrey, 16 Ves. jun. 390.

<sup>(</sup>a) Supra, p. 351.

<sup>(</sup>b) Eyton v. Dicken, 4 Price, 303.

<sup>(\*355)</sup> 

terial that there is only a general and vague description of the estate on the rolls(c), and the purchaser will be compelled to take the title.

Equity discountenances the destruction of contingent remainders (d), yet if they really are barred, a purchaser will be compelled to accept the title. This point, which was formerly doubted, was very fully argued before Lord Eldon (e), who several times expressed a strong opinion upon it in favor of the seller, although ultimately he was not called upon to decide the point; and it has since been decided by Sir John Leach, when Vice-Chancellor (f).

In Beevor v. Simpson(g), the Master of the Rolls held, that a solicitor who had been employed by a person to advise on the title to a property, could not on purchasing the same property from his client set up an objection to the title, which he did not think of any importance when advising his principal. His Honor also decided, that although there were two partners, and the purchaser, who was one of them, did not personally interfere with the title or the purchase by his client, and swore by his answer that he had no recollection of the title at the time of his purchase, yet these circumstances did not vary the rule.

Where an abstract begins with a recovery to bar an entail, it is usual in practice to call for the deed creating the entail, in order to see that the estate tail and remainders (\*)over, if any, were effectually barred(1). But if the

- (c) Long v. Collier, 4 Russ. 267.
- (d) Roake v. Kidd, 5 Ves. jun. 647.
- (e) Kenn v. Corbett, MS.
- (f) Hasker v. Sutton, 2 Sim. & Stu. 313.
- (g) 1 Tamlyn, 69.

<sup>(</sup>I) This makes it advisable in deeds for an estate tail to recite so (\*356)

deed is lost, and possession has gone with the estates created by the recovery, for a considerable length of time, and the presumption is in favor of the recovery having been duly suffered, the purchaser will be compelled to take the title, although the contents of the deed creating the entail do not actually appear (h).

So where an old deed recites prior deeds, and the seller is unable to procure the instruments recited, the true inquiry is, whether the absence of the deeds recited throws any reasonable doubt upon the title. Where there is a title of sufficient age without the aid of the recited deeds, and no circumstance to repel the presumptions in favor of the title, the Court will compel the purchaser to accept it(i).

Where a vendor is tenant in tail, with reversion to himself in fee, and the reversion has vested in different persons, a common recovery is generally required by a purchaser; because that bars the remainder, while a fine lets it into possession, and thereby subjects the whole fee to any incumbrance which before affected the reversion only. But unless some incumbrance appear, or the title to the reversion is not clearly deduced, the Court will not compel a vendor to suffer a recovery on account of the mere probability of the reversion having been incumbered(I).

- (\*)Thus in a late case(k), upon an exception to the Master's report in favor of the title, the objection to
- (h) Coussmaker v. Sewell, Ch. 4th May 1791, MS.; Appendix, No. 14; and see Nouaille v. Greenwood, 1 Turn. 26.
  - (i) Prosser v. Watts, 6 Madd. 59.
  - (k) Sperling v. Trevor, 7 Ves. jun. 497.

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much of the instrument under which the tenant in tail claims as will manifest his power of barring the estate tail and remainders over.

<sup>(</sup>I) This is allowed to remain as an illustration of the doctrine, although the law is now altered by the 3 & 4 W. 4, c. 74.

the title was, that one Elizabeth Baker ought to join in a recovery; the title being derived from John Pain, who, in 1693, limited the estate to the use of himself for life; remainder, subject to a term, to uses which never arose; remainder to his daughters in tail; remainder to himself in fee. Under these limitations, Elizabeth, an only daughter, became seised in tail, with the immediate reversion to her father, who made a will, not executed so as to pass real estate, whereby he devised all his estate to his second wife. Upon his death, Elizabeth his daughter entered, and levied a fine. She had issue a daughter, Elizabeth, who married William Baker. They had issue one daughter, Elizabeth Baker. From her the estate was purchased under a decree, and by mesne purchases became vested in the plaintiff. The defendant, the purchaser, suggested, that the ultimate remainder in fee might have been by deed or will disposed of by John Pain, or by any other person to whom it might have descended; and if the same should have been so disposed of, it could then be barred only by Elizabeth Baker. The Lord Chancellor held a recovery not necessary.

At this day it frequently happens, that in deeds securing debts on real estate, the estate is authorized to be sold without the assent of the owner, in case default is made in payment of the money on the day named. Such a security is so far a mortgage, that the owner may at any time before a sale require a re-conveyance upon paying the money due; and in consequence of the old rule, that once a mortgage always a mortgage, the owner is in these cases usually required to join in the conveyance, (\*)which he is mostly unwilling to do; his object being to prevent a sale. But it has been decided by Lord Eldon, that the objection cannot be sustained, and this decision was made in a case where the deed was in form a regular mortgage with a power of sale, and the mortgagor in his (\*358)

answer stated that he actually resisted the sale as having been made without his consent and at an undervalue(l). This has been followed in many later cases, and is now an established rule(m).

I. It is clear that a woman is barred of her dower, both at law and in equity, by a legal term created previously to her right of dower attaching on the estate, of which an assignment has been obtained by a purchaser to attend the inheritance(n). For although she can recover her dower at law, it will be with a cesset executio during the term, and equity will not remove the bar. But notwith-standing that a purchaser could obtain an assignment of an outstanding term, which would bar the vendor's wife of her dower, a fine was always required from the vendor and his wife at his expense. It was, however, decided, that a court of equity would enforce a purchaser to accept the title without a fine(o).

The wife of a trustee in fee, or of a mortgagee in fee of a forfeited mortgage, is at law entitled to dower; but a fine is on that account never required by a purchaser; because, if the wife of a trustee or a mortgagee were to (\*)be so ill-advised as to prosecute her legal claim, equity would, at this day, undoubtedly saddle her with all the costs(p).

(1) Clay v. Sharpe and others, Ch. Mich. Term. 1802, Lib. Reg. A. 1802, fo. 66, Appendix, No. 15.

(m) Baker v. Dibbin, Dibbin v. Baker, Exch. April 20, 1812, MS.; Corder v. Morgan, 18 Ves. 344; Note, Stabback v. Leatt, Coop. 46, which was taken from a hasty note on a brief, is not, when attentively considered, an authority the other way.

(n) Vide infra, ch. 9.

(o) See 10 Ves. jun. 261, 262; 1 Jac. & Walk. 665; 1 Jac. 490.

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<sup>(</sup>p) See Noel v. Jevon, Bevant v. Pope, 2 Freem. 43, 71. See Gervoyes's case, Mo. 717, pl. 1002; and see 4 Co. 3 b; 4 Bro. C. C. 506, n; Mansfield's case, Harg. n. 81; Co. Litt. 33, a; Simpson v. Gutteridge, 1 Madd. 609.

It was a point of some nicety, which was in former editions discussed at length in this place, whether where the wife of a vendor had only an equitable jointure, a purchaser could require a fine. But the late statutes(q) have rendered it unnecessary to do more than refer to the authorities with a view to cases depending upon the old law.

It is not necessary that a wife should previously to marriage be a party to the deed securing her jointure, but there is no decision to prove that a jointure can be made upon a wife before marriage without the privity of herself, or if under age of her guardian, which will bind her(r). There have been different opinions upon this question; but if a wife could be barred without her privity, a man might in every case secretly bar his wife of dower by a mere nominal jointure. The statute does not authorize such a fraud; and it would lead to great inconvenience to refer it to a jury to inquire whether a jointure made without the wife's privity was fraudulent or not. The power which the statute reserves to a woman to elect her dower where a jointure is made after marriage, unless by act of parliament, appears to proceed on the ground that she is during the coverture incapable of consenting to the jointure without the aid of parliament; and seems to prove that the legislature could not intend to bind her by a jointure made without her privity, when she was competent (\*)to consent. If her consent was not necessary, it would be unimportant whether the jointure was made by her husband before or after marriage. At the common law, a jointure before marriage was not a bar of dower for two reasons: 1. Because the woman had no title of dower at the time of the acceptance of the satisfaction;

<sup>(</sup>q) 3 & 4 W. 4, c. 74; 3 & 4 W. 4, c. 105.

<sup>(</sup>r) In Jordan v. Savage, 2 Eq. Ca. Abr. 101, the widow took possession of the lands limited to her for her jointure by the articles; see 2 Eden. 66.

2. Because no collateral satisfaction can bar any right or title of any inheritance or freehold. Coke explains the origin of jointures thus: Before the making of the statute of uses, the greatest part of the land in England was conveyed to uses, and as a wife was not dowable of uses, her father or friends upon her marriage procured the husband to take an estate from his feoffees, or others seised to his use, to him and to his wife before or after marriage for their lives or in tail, for a competent provision for the wife after the husband's death. Then came the statute of uses, by the operation of which, if further provision had not been made, the wives would have as well their dowers as their jointures, and for this reason the branches concerning jointures were added to the statute(s). In a passage where Coke says, that if a jointure is made to a woman before marriage the wife cannot wave it, he refers to an authority in which the jointure was made in performance of covenants(t). It is evident that Coke considered that her assent was requisite to a jointure made before marriage. Gilbert was of the same opinion. In his Uses(u), he says, if a jointure be made before marriage, she is sole, and as such under no man's power; if after marriage she take a jointure in satisfaction of a dower, she may wave it after coverture. But whatever may be the law on this point, no jointure is ever made without the wife's privity. No case has occurred since the statute of Henry 8. of a jointure made without the wife's privity, (\*) and not afterwards accepted by her. Of course, therefore, no distinction ever existed in practice between such cases, and cases where the wife being adult consented to the provision. The provision in each case, that is, whether made with or without her consent, equally proceeds from the husband, and is equally supported by the same consideration; viz. marriage. If the jointure, made with

<sup>(</sup>s) 4 Rep. 1 b, 2 a. (t) Ib. 3. (u) Page 152. (\*361)

the wife's privity before marriage, does not preclude her from claiming dower out of her husband's other estates, if she be evicted from her jointure, under the provision in the statute, of course the same rule must prevail in equity. Clearly, equity could not, on the ground of implied contract, or of the wife's right to investigate the title to the jointure lands, restrain her from claiming her dower out of her husband's other estates. No such equity has ever been administered. It is admitted, that jointures made with the wife's privity are only a bar by force of the statute, but the bar does not extend to the excepted case of an eviction of the dower; and to raise a case of equity against a woman claiming the benefit of the exception, it would be necessary to prove an express contract by her relinquishing such benefit.

The Author, in the last edition, stated his impression to be, that where an estate would be subject to the dower of the vendor's wife, if she were not barred by a jointure, whether legal or equitable, the vendor must either procure his wife to levy a fine of the estate at his own expense, or must produce a satisfactory title to the jointure lands. And this was no more than is constantly required where an estate has been taken in exchange. The vendor is compelled to produce the title not only to the estate sold, but also to the estate given by him in exchange. The same principle applied to the case under consideration.

(\*)But this, like the former point, is only material with reference to cases not within the late Act, to which reference will shortly be made. A fine cannot now be levied.

II. Equity appears to consider any provision, however inadequate or precarious it may be, which an adult previously to marriage accepts in lieu of dower, a good

equitable jointure(x)(213): and will in some cases even imply an intention to bar the wife of her dower; thus, where a provision was made for the livelihood and maintenance of the wife after her husband's death, although it was not expressed to be in bar of dower, yet it was holden to be a bar in equity, on the implied intention of the parties(y)(214).

But in a case where a leasehold estate was settled before marriage upon the intended wife "in recompense,

(x) Jordan v. Savage, Bac. Abr. Jointure, (B) 5; Charles v. Andrews, 9 Mod. 152; Williams v. Chitty, 3 Ves. jun. 545; 4 Bro. C. C. 513. This was admitted by the counsel for the appellants in Drury v. Drury. See 5 Bro. P. C. 581.

(y) Vizard v. Longdale, 3 Atk. 8, cited; reported 2 Kel. Cha. Ca. 17, nom. Vizod v. Londen. See 2 Com. Dig. 148; Estcourt v. Estcourt, 1 Cox, 20. See Tinny v. Tinny, 3 Atk. 8; Couch v. Statton, 4 Ves. jun. 391; and Garthshore v. Chalie, 10 Ves. jun. 20. See Sugd. n. (7) to Gilb. on Uses, p. 332.

In Hastings v. Dickinson, it was held, that where the wife covenanted in a marriage settlement not to demand dower in the husband's estate in consideration of an annuity, which was to be paid out of his estate, this was no bar of dower. At common law a jointure made to a wife, before or after marriage, was no bar to her dower; because the dower being a freehold could not be barred by any collateral satisfaction. And no jointure is a bar within the statute of 27 Hen. 8. c. 10, unless it be a freehold in lands, tenements or hereditaments, for the life of the wife at least, and which shall take effect in possession or profit immediately on the husband's death. The covenant cannot have the effect of a release of dower; for a release of a future demand, not then in existence, is void. On this principle, if there be any relief against the widow on her covenant, it must be by action.

(214) See Van Orden v. Van Orden, 10 Johns. Rep. 30. Adsit v. Adsit, 2 Johns. Ch. Rep. 448. See also, Smith v. Kniskern, 4 Johns. Ch. Rep. 9. Swaine v. Perine, 5 Johns. Ch. Rep. 482. Webb v. Evans, 565, 572. Kennedy v. Nedrow, 1 Dall. 415. Creacraft v. Wions, Addis. 350. Herbert v. Wren, 7 Cranch, 370. Ward v. Wilson, 1 Des. 401, 409. Snelgrove v. Snelgrove, 4 Des. 274, 293.

<sup>(213)</sup> See Hasting's v. Dickinson, 7 Mass. Rep. 153. Ambler v. Norton, 4 Hen. & Munf. 23.

and bar of dower, and for a provision for her," and the husband had no real estate, it was held that the wife's right to thirds was not barred(z). For, as the declared object was to bar her of dower, no implication could be admitted, that she was to be barred of thirds also; the direction that the settlement was for a provision for her, only expressed the effect of the settlement, and could not be deemed evidence of an intention to bar her of a right which was not named.

(\*)So, as infants are within the statute of Henry 8.(a), and may be barred of dower at law, they may in like manner be barred by an equitable jointure(b).

But an equitable provision in bar of dower will not bind an infant, unless it be as certain a provision as her dower. Therefore a settlement of an estate upon an infant for life, after the death of her husband and any third person, will not be a good bar, as the stranger may survive the wife(c). So a provision that the personal estate shall go according to the custom of London, in bar of dower, or any provision of that nature, will not be deemed an equitable bar of dower to an infant, on account of the uncertainty and precariousness of the provision(d).

Supposing an equitable jointure to be merely charged on stock vested in trustees, and the wife to have been married under age, there seems reason to contend, that if the fund should be wasted by the trustees, equity would not restrain the wife from proceeding for her dower; and in

<sup>(</sup>z) Cresswell v. Byron, 3 Bro. C. C. 362. See Pickering v. Lord Stamford, 3 Ves. jun. 332.

 <sup>(</sup>a) Drury v. Drury, or, Earl of Bucks v. Drury, 5 Bro. P. C. 570;
 4 Bro. C. C. 506, n.; Wilmot, 177.

<sup>(</sup>b) See the cases, ante n. (t).

<sup>(</sup>c) Caruthers v. Caruthers, 4 Bro. C. C. 500. See Corbet v. Corbet, 1 Sim. & Stu. 612, which was affirmed by the Lord Chancellor upon appeal.

<sup>(</sup>d) Smith v. Smith, 5 Ves. jun. 189; 5 Russ. 254.

that case a purchaser would certainly have been entitled to a fine(I).

In Caruthers v. Caruthers(e), Lord Alvanley, then Master of the Rolls, addressing himself to what was and what was not an equitable bar of dower to an infant, put the case of a charge in bar of dower made upon an

estate with a bad title, and held that it would be no bar. Therefore, whatever opinion may be entertained on the general question, a purchaser must be satisfied of the title (\*)to the lands upon which the equitable jointure of a feme covert married under age is charged. And where the settlement rests in covenant, the purchaser should not complete his contract until the covenant be actually performed; for an alienation by the husband of the fund out of which the jointure is to arise, will be deemed an eviction of the fund, and consequently the wife will be let in for her dower(f).

III. The foregoing observations apply to the law as it stood before the 3 & 4 Wil. 4, c. 105. That Act is not to extend to the dower of any widow who shall have been or shall be married on or before the 1st January 1834, and is not to give to any will, deed, contract, engagement or charge executed, entered into, or created before that day, the effect of defeating or prejudicing any right to dower(g). It is, therefore, still necessary to know what the law was with reference to the cases to which the Act does not extend. And it must be borne in

<sup>(</sup>e) 4 Bro. C. C. 500. See 5 Ves. jun. 192.

<sup>(</sup>f) Drury v. Drury, 4 Bro. C. C. 506, n.

<sup>(</sup>g) Sec. 14. The 3 & 4 W. 4, c. 74, s. 77, may be held to extend to dower, so as to enable a married woman to destroy it, but it does not in expression accurately embrace it.

<sup>(</sup>I) This point does not appear to be decided either by Drury v. Drury, or Williams v. Chitty.

<sup>(\*364)</sup> 

mind that as to widows within the exception, their rights are saved in estates acquired by their husbands, even after the 1st January 1834.

The right of dower of women married after the 1st January 1834, is placed on altogether a different footing. It is enacted, that when a husband shall die, beneficially entitled to any land(I) for an interest which shall not entitle his widow to dower out of the same at law, and such interest, whether wholly equitable, or partly legal (\*)and partly equitable, shall be an estate of inheritance in possession, or equal to an estate of inheritance in possession, (other than an estate in jointenancy,) then his widow shall be entitled in equity to dower out of the same land(h), so that now dower attaches on equitable estates.

And when a husband shall have been entitled to a right of entry or action in any land, and his widow would be entitled to dower out of the same if he had recovered possession thereof, she shall be entitled to dower out of the same although her husband shall not have recovered possession thereof; provided that such dower be sued for or obtained within the period during which such right of entry or action might be enforced (i).

1. The above are both provisions extending the wife's right to dower; but the other provisions place the right altogether in the power of the husband. For no widow shall be entitled to dower out of any land which shall have been absolutely disposed of by her husband in his lifetime, or by his will(k).

<sup>(</sup>h) Sec. 2.

<sup>(</sup>i) Sec. 3.

<sup>(</sup>k) Sec. 4.

<sup>(</sup>I) The word "land" shall extend to manors, advowsons, messuages, and all other hereditaments, whether corporeal or incorporeal (except such as are not liable to dower), and to any share thereof; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; sect. 1.

- 2. All partial estates and interests, and all charges created by any disposition or will of a husband, and all debts, incumbrances, contracts, and engagements to which his land shall be subject or liable, shall be valid and effectual as against the right of his widow to dower(l).
- 3. And a widow shall not be entitled to dower out of any land of her husband when in the deed by which such land was conveyed to him, or by any deed executed by him, it shall be declared that his widow shall not be entitled to dower out of such land(m).
- 4. And a widow shall not be entitled to dower out of any land of which her husband shall die wholly or partially intestate when by the will of her husband, duly (\*) executed for the devise of freehold estates, he shall declare his intention that she shall not be entitled to dower out of such land, or out of any of his land(n).
- 5. And the right of a widow to dower shall be subject to any conditions, restrictions, or directions which shall be declared by the will of her husband, duly executed as aforesaid(o).

There appears to have been no sufficient ground for this alteration of the law. The wife's ancient right of dower has been in effect taken away. And surely it is inconsistent, whilst you enable the husband in every case to defeat it, to extend the right over equitable estates. The first clause of the provision, No. 3, was suggested by the Author, and was, by the desire of Lord Eldon, introduced into a bill for altering the statute of limitations, brought into the House of Commons by the present Vice-Chancellor, when he was a member of that House. It was no infringement upon the right of the wife, for as the husband might have limited the estate to uses to bar dower, so as to prevent dower from attaching, there was no reason why his

<sup>(</sup>l) Sec. 5.

<sup>(</sup>n) Sec. 7. (\*366)

<sup>(</sup>m) Sec. 6.

<sup>(</sup>o) Sec. 8.

simple declaration should not have the same operation; and the object was to prevent the unnecessary creation of powers. But the vesting of a power in the husband to defeat the wife's right after it has attached must be defended upon different grounds.

The Act then proceeds to provide for the cases in which testamentary provisions by the husband for his wife shall

be a bar of her dower.

1. Where a husband shall devise any land out of which his widow would be entitled to dower if the same were not so devised, or any estate or interest therein, to or for the benefit of his widow, such widow shall not be entitled to dower out of or in any land of her said husband, (\*)unless a contrary intention shall be declared by his will(p).

2. But no gift or bequest made by any husband to or for the benefit of his widow of or out of his personal estate, or of or out of any of his land not liable to dower, shall defeat or prejudice her right to dower, unless a con-

trary intention shall be declared by his will(q).

And it is provided that nothing in the Act contained shall prevent any court of equity from enforcing any covenant or agreement entered into by or on the part of any husband not to bar the right of his widow to dower out of his lands(r). Nor is any thing in the Act to interfere with any rule of equity, or of any ecclesiastical court, by which legacies bequeathed to widows in satisfaction of dower are entitled to priority over other legacies(s).

Lastly, dower ad ostium ecclesiæ, and dower ex assensu patris, are abolished (t).

In the case of Pope v. Simpson(u), Lord Rosslyn ap-

<sup>(</sup>p) Sec. 9.

<sup>(</sup>r) Sec. 11.

<sup>(</sup>t) Sec. 13.

<sup>(</sup>q) Sec. 10.

<sup>(</sup>s) Sec. 12.

<sup>(</sup>u) 5 Ves. jun. 145. (\*367)

pears to have held, that persons purchasing from the assignees of a bankrupt have no right to expect more, than that the assignees should deliver over such title as the bankrupt had. This decision, however, was opposed by prior cases(x), and the general rules of equity; and in a late case Lord Eldon expressly denied the doctrine advanced by Lord Rosslyn(y); and Sir William Grant actually decided, that assignees stand in the situation of ordinary vendors(z).

(\*)But in a case(a) where assignees, having a defective title, put it up to sale, and one of the conditions stated, that the purchaser should have an assignment of the bankrupt's interest to one moiety of the estate, under such title as he lately held the same, an abstract of which might be seen at a place named in the conditions, the Vice-Chancellor stated, that a vendor, if he thinks fit, may stipulate for the sale of an estate with such title only as he happens to have; and he held, that in this case the assignees sold only such title as they had; but as it was stated that the conditions of sale were not circulated before the sale, the purchaser was offered an inquiry as to this fact.

Conditions like that in Freme v. Wright should be looked at with great jealousy, as they are often traps for the unwary; and the Court should at least expect the fact to be broadly stated, that the seller only sells such title as he has, without warranting the same.

In Dick v. Donald, in the House of Lords, where the articles of roup in Scotland bound the seller to execute and deliver a valid irredeemable disposition of the pro-

(\*368)

<sup>(</sup>x) Spurrier v. Hancock, 4 Ves. jun. 667; and see Orlebar v. Fletcher, 1 P. Wms. 737.

<sup>(</sup>y) White v. Foljambe, 11 Ves. jun. 337; and see 18 Ves. 512.

<sup>(</sup>z) M'Donald v. Hanson, 12 Ves. jun. 277.

<sup>(</sup>a) Freme v. Wright, 4 Madd. 364. See Baxter v. Conolly, 1 Jac. & Walk. 576; Wilmot v. Wilkinson, 6 Barn. & Cress. 506.

perty, and to deliver to the purchaser certain specified instruments, "which are all the title-deeds of the property in his, the seller's custody," and it was insisted that the title was limited by the articles of roup, it was decided otherwise; and Lord Eldon said, that he could see nothing in the article of roup to take away the right to a good title. As to the condition with respect to the title-deeds, he never heard that because the seller provides, by the condition, that he will give to the purchaser only certain specified deeds, the purchaser must take a bad title, or such title as appears upon the deeds(b).

(\*)In Clarke v. Faux(c), an estate was sold by assignees of a bankrupt, and a good title was to be made. One of the assignees purchased and took possession. He agreed to sell to the plaintiff, who entered into possession, and paid part of his purchase-money. A dispute was terminated by an agreement that the plaintiff should pay the residue of the purchase-money on a day named, together with interest, upon the seller to him making a good title to the premises, or otherwise, if such title should not then be completed, upon the seller executing at his own expense a bond to complete such title, and to convey the estate as soon as the same could be completed. A good title could not be made by the seller to the plaintiff, who recovered the residue of the purchase-money at law, and having tendered a bond conditioned for making a good title to the purchaser, he insisted, in answer to the plaintiff's bill, that the plaintiff was bound to take the property with the bond, whether a good title could be made or not. But it was held that the meaning of the parties was, that the money was to be paid on the day named, although the title might not then be completed; but subject always to this condition, that the vendor had the power to com-

<sup>(</sup>b) 1 Bligh, N. S. 655.

<sup>(</sup>c) 3 Russ. 320.

plete it, and that it was not intended that it should be

paid if the vendor did not possess such power.

Formerly, where a vendor claimed under a modern will, by which the heir at law was disinherited, it was usual to require the will to be proved in equity against the heir at law(d): but this practice is now almost wholly discontinued. In the case of Colton v. Wilson(e), the purchaser was in the first instance discharge from his purchase on account of the will not being proved against the heir at (\*)law; but on a re-hearing he was compelled to take the title. This decree, however, was made on the particular circumstances of the case, and the point was by no means settled. In Bellamy v. Livers idge(f), the title received the Master's approbation, although the will was not proved against the heir at law; and upon exceptions to his report on that account coming on, Lord Kenyon, then Master of the Rolls, overruled them.

It is not unusual to require the heir at law to join in the conveyance, if his concurrence can be easily obtained; and where he is a party to a conveyance in any other character, he is invariably made a conveying party, in his character of heir at law; although in strictness this could not be insisted upon.

If it should even be thought that a modern will must be proved against the heir at law, yet it seems clear that equity would not compel the vendor, at the suit of the purchaser, to prove the will *per testes*. The objection, therefore, under any construction, could only be set up by a purchaser, as a *defence* to a specific performance.

<sup>(</sup>d) See Fearne's Posthuma, 234. See Harrison v. Coppard, 2 Cox, 318, as to the custody of the will.

<sup>(</sup>e) 3 P. Wms. 190.

<sup>(</sup>f) Chan. 12 June 1786, MS.; and see Wakeman v. Duchess of Rutland, 3 Ves. jun. 233; 8 Bro. P. C. 145; and Morrison v. Arnold, 19 Ves. jun. 673; sed vide Smith v. Hibbard, 2 Dick. 730.

<sup>(\*370)</sup> 

Where a will has been executed it must be produced before a purchaser can be compelled to accept the title, although having been treated as a nullity by a professional man it has been mislaid, and the seller, being heir of the testator, has rested upon his title as heir(g).

As the law of descent has lately been greatly altered, we may, perhaps, in this place, usefully introduce the Act(h) by which the alteration was effected.

(\*) The statute enacts, 1. That in every case descent(1)

- (g) Stevens v. Guppy, 2 Sim. & Stu. 439.
- (h) 3 & 4 W. 4, c. 106.

<sup>(</sup>I) The word "land" shall extend to manors, advowsons, messuages, and all other hereditaments, whether corporeal or incorporeal, and whether freehold or copyhold, or of any other tenure, and whether descendible according to the common law, or according to the custom of gavelkind or borough-english, or any other custom, and to money to be laid out in the purchase of land, and to chattels and other personal property transmissible to heirs, and also to any share of the same hereditaments and properties or any of them, and to any estate of inheritance, or estate for any life or lives, or other estate transmissible to heirs, and to any possibility, right, or title of entry or action, and any other interest capable of being inherited, and whether the same estates, possibilities, rights, titles, and interests, or any of them, shall be in possession, reversion, remainder, or contingency; and the words "the purchaser" shall mean the person who last acquired the land otherwise than by descent, or than by any escheat, partition, or inclosure, by the effect of which the land shall have become part of or descendible in the same manner as other land acquired by descent; and the word "descent" shall mean the title to inherit land by reason of consanguinity, as well where the heir shall be an ancestor or collateral relation, as where he shall be a child or other issue; and the expression "descendants" of any ancestor shall extend to all persons who must trace their descent through such ancestor; and the expression "the person last entitled to land" shall extend to the last person who had a right thereto, whether he did or did not obtain the possession or the receipt of the rents and profits thereof; and the word "assurance" shall mean any deed or instrument (other than a will) by which any land shall be conveyed or transferred at law or in equity; and every (\*371)

shall be traced from the purchaser; and to the intent that the pedigree may never be carried further back than the circumstances of the case and the nature of the title shall require, the person last entitled to the land shall, for the purposes of this Act, be considered to have been the purchaser thereof unless it shall be proved that he inherited the same, in which case the person from whom he inherited the same shall be considered to have been the purchaser unless it shall be proved that he inherited (\*)the same; and in like manner the last person from whom the land shall be proved to have been inherited shall in every case be considered to have been the purchaser, unless it shall be proved that he inherited the same(i).

- 2. And when any land shall have been devised, by any testator who shall die after the 31st day of December 1833, to the heir or to the person who shall be the heir of such testator, such heir shall be considered to have acquired the land as a devisee, and not by descent; and when any land shall have been limited, by any assurance executed after the said 31st day of December 1833, to the person or to the heirs of the person who shall thereby have conveyed the same land, such person shall be considered to have acquired the same as a purchaser by virtue of such assurance, and shall not be considered to be entitled thereto as his former estate or part thereof(k).
- 3. And when any person shall have acquired any land by purchase under a limitation to the heirs or to the heirs of the body of any of his ancestors, contained in an

(i) Sec. 2.

(k) Sec. 3.

word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male. Sect. 1.

assurance executed after the said 31st day of December 1833, or under a limitation to the heirs or to the heirs of the body of any of his ancestors, or under a limitation having the same effect, contained in a will of any testator who shall depart this life after the said 31st day of December 1833, then and in any of such cases such land shall descend, and the descent thereof shall be traced as if the ancestor named in such limitation had been the purchaser of such land(l).

4. No brother or sister shall be considered to inherit immediately from his or her brother or sister, but every descent from a brother or sister shall be traced through

the parent(m).

(\*)5. And every lineal ancestor shall be capable of being heir to any of his issue; and in every case where there shall be no issue of the purchaser, his nearest lineal ancestor shall be his heir in preference to any person who would have been entitled to inherit, either by tracing his descent through such lineal ancestor, or in consequence of there being no descendant of such lineal ancestor, so that the father shall be preferred to a brother or sister, and a more remote lineal ancestor to any of his issue, other than a nearer lineal ancestor or his issue(n).

6. And none of the maternal ancestors of the person from whom the descent is to be traced, nor any of their descendants, shall be capable of inheriting until all his paternal ancestors and their descendants shall have failed; and also that no female paternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male paternal ancestors and their descendants shall have failed; and that no female maternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male maternal ancestors and their descendants shall have failed(o).

<sup>(</sup>l) Sec. 4.

<sup>(</sup>n) Sec. 6.

<sup>(</sup>m) Sec. 5.

<sup>(</sup>o) Sec. 7.

7. And where there shall be a failure of male paternal ancestors of the person from whom the descent is to be traced, and their descendants, the mother of his more remote male paternal ancestor, or her descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male paternal ancestor, or her descendants; and where there shall be a failure of male maternal ancestors of such person, and their descendants, the mother of his more remote male maternal ancestor, and her descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male maternal ancestor, and her descendants(p).

(\*)8. And any person related to the person from whom the descent is to be traced by the half blood shall be capable of being his heir; and the place in which any such relation by the half blood shall stand in the order of inheritance, so as to be entitled to inherit, shall be next after any relation in the same degree of the whole blood, and his issue, where the common ancestor shall be a male; and next after the common ancestor where such common ancestor shall be a female, so that the brother of the half blood on the part of the father shall inherit next after the sisters of the whole blood on the part of the father and their issue, and the brother of the half blood on the part of the mother shall inherit next after the mother (q).

9. And when the person from whom the descent of any land is to be traced shall have had any relation who, having been attainted, shall have died before such descent shall have taken place, then such attainder shall not prevent any person from inheriting such land who would have been capable of inheriting the same, by tracing his descent through such relation, if he had not been attainted, unless such land shall have escheated in conse-

quence of such attainder before the 1st day of January 1834(r).

10. But the Act does not extend to any descent which shall take place on the death of any person who shall die before the said 1st day of January 1834(s).

And where any assurance executed before the said 1st day of January 1834, or the will of any person who shall die before the same 1st day of January 1834, shall contain any limitation or gift to the heir or heirs of any person, under which the person or persons answering the description of heir shall be entitled to an estate by purchase, then the person or persons who would have (\*)answered such description of heir, if this Act had not been made, shall become entitled by virtue of such limitation or gift, whether the person named as ancestor shall or shall not be living on or after the said 1st day of January 1834(t).

IV. There is a serious objection frequently taken to titles, which it may not be improper to consider in this place.

The objection to which I allude is, that an equitable recovery is void where the equitable tenant to the præcipe has the legal estate. In support of this objection, it is urged, that where the legal freehold is limited to one for life, with an equitable remainder to the heirs of his body, the estates cannot coalesce so as to make the parent tenant in tail, notwithstanding that he has the beneficial, and consequently the equitable estate for life; and therefore, upon the same principle, the legal tenant for life cannot be considered as seised of an equitable estate, distinct from his legal estate, so as to support the recovery as a good equitable recovery.

In answer to this argument, it may be said, that the

<sup>(</sup>r) Sec. 10. (s) Sec. 11. (t) Sec. 12. (\*375)

reason why the equitable remainder to the heirs of the body cannot coalesce with the legal estate for life is, that the rule in Shelly's case requires both estates to be legal. This is an imperative rule of law, which courts of equity . can no more depart from than they can alter the rules of descent. Equity, however, follows the law; and, therefore, if both estates are equitable, they will unite in the same manner as if they were legal estates. But as Mr. Fearne, with his usual ability, observes, when both the estates are not legal, the application of a legal construction, or operation of a rule of law, which must equally affect both, (\*) seems to be excluded by one of the objects of that construction not being a subject of legal cognizance. So when both are not equitable estates, their combination seems to be out of the reach of an equitable construction to which one of the estates is not adapted (u).

Now this difficulty does not occur in the principal case. The equitable estate tail has no existence in contemplation of law, but depends wholly on the rules of equity for its support. And therefore there is no rule of law which says that the recovery shall be void. Equity, with respect to equitable recoveries, adheres as nearly as may be to the mode of barring entails prescribed by the law. In this instance the analogy is strictly preserved, for the tenant to the *præcipe* has the equitable estate of freehold. And if a court of equity were to hold a recovery bad, on the ground of the equitable tenant to the *præcipe* having the legal estate, it would only make another deed necessary. The tenant for life would convey to a third person in trust for himself, before he made a tenant to the *præcipe*, and by this simple expedient vanquish the objection.

In a manuscript opinion, given by Mr. Fearne, on this point, in which he held the recovery to be good, although the equitable tenant to the *præcipe* had the legal estate,

<sup>(</sup>u) Cont. Remainders, p. 78, 5th edit. (\*376)

he first adverts to the analogy preserved between legal and equitable recoveries, and then proceeds thus: "The principle applies with no less force, where we suppose the tenant for life to be of the legal estate, for his own benefit. For then the equitable interest is involved in the legal; and of consequence all that is required by the said rule of analogy is had in his concurrence, viz. the concurrence of the person entitled to the beneficial interest or pernancy of the profits of the immediate estate of freehold. If the concurrence of a person entitled to the mere beneficial (\*)interest of freehold will answer the rule of analogy to the requisite extent for barring equitable estates tail and remainders, can there be a doubt in regard to the competency of the person entitled not merely to that degree of interest, but to a comprehending greater estate, adequate even to the purpose of barring legal estates and remainders? The analogy supposes that a recovery by an equitable tenant in tail will bar the equitable estate tail and remainders, and reversion, even where, if the estate tail and remainders had been legal, such recovery would not have barred them for want of a legal tenant to the pracipe; because that analogy in the one case substitutes an equitable tenant in the place of a legal one in the other. Now, can the same rule of analogy ever deny to a recovery by a tenant in tail of an equitable estate the same effect in barring his estate tail and the subsequent equitable remainders and reversion, as it would have had if all those estates had been legal? Such a doctrine would be outrunning the analogy, and the very ground for its adoption, in disabling those very persons from barring equitable estates tail and remainders, who might have barred them if they had been legal instead of equitable. This would scarcely be reconcilable with the well-known maxim of æquitas sequitur legem.

If the objection cannot be supported upon principle, much less can it be sustained upon authority. On the

one hand, it has never been said that such a recovery is void, except in the case of Shapland v. Smith(x), where Lord Thurlow is made to say, that Christopher had only an equitable estate for life, and the subsequent estate being executed, he had an equitable estate for life, and a legal remainder in tail, which could not unite; and of course there could not be a good tenant to the *præcipe*, (\*)and the recovery suffered was void; it being necessary, in order to make a good tenant to the præcipe, that there should be a legal estate for life, with a legal reversion in tail, or an equitable estate for life, with an equitable reversion in tail. Upon the latter dictum, Mr. Fearne, in the opinion before referred to, observes, that he could not hesitate in imputing it to the same inaccuracy or misapprehension of the reporter to which other unwarrantable positions in the same case must, as he conceived, be ascribed. That case came before the Court in consequence of his opinion, taken by the intended purchaser, in which he had objected to the title on the ground of Shapland's taking only an equitable estate for life, and the limitation to the heirs of his body operating as a contingent legal remainder to such heirs; the equitable and legal estates being incapable of that union which was requisite to vest the latter at all in him, or give him an estate-tail of any kind. Baron Eyre inclined against the objection; but on a re-hearing Lord Thurlow admitted it, and the insufficiency of the recovery depended, as he (Mr. F.) understood, not on the want of a good tenant to the præcipe, but the want of an estate tail in Shapland. And the report accordingly in the margin states, that it was not an estate tail in C. S. though the report itself makes the Chancellor speak of it as a legal remainder in tail in him. Mr. Fearne concludes by saying, that "therefore he could lay no sort of stress on any vague

expressions in such a report." And indeed it seems clear, that the ground of Lord Thurlow's judgment was, the impossibility of the estates uniting, the one being equitable, and the other legal; and that his observations on legal and equitable recoveries are mis-stated in the report. A slight emendation will make the sentence, which refers to this doctrine, correct. It may be read thus: "It being necessary, in order to make a good tenant to the præcipe, (\*)that there should be a legal estate for life, where there is [instead of with] a legal reversion in tail; or an equitable estate for life, where there is [instead of with] an equitable reversion in tail." And this sentence, as corrected, by no means implies that a legal tenant for life, for his own benefit, has not an equitable estate for life, sufficient to support an equitable recovery.

If then we remove this dictum of Lord Thurlow, as it stands in the report, there is no authority in the books in support of the objection. But, on the other hand, we have Lord Alvanley's authority, that where the equitable tenant for life has also the legal estate for life, that is no objection to the recovery. And this observation was not lightly made, for his Lordship repeated it in the course of his judgment(y). And indeed the very point appears to have been decided in the 16th year of Charles 2d, in a case where a man was legal tenant for life by conveyance; and afterwards the reversioner and ancestor covenanted, in consideration of blood, to settle the estate on him in tail; so that in equity he had a trust in tail in the estate. And the Court confirmed a recovery suffered by him, although at the time of suffering it he was but tenant for life in law; and this although it was objected that he ought first to have exhibited his bill, and have had his estate decreed to him in tail according to the articles(z).

<sup>(</sup>y) Phillips v. Bridges, 3 Ves. jun. 126, 128.

<sup>(</sup>z) Goodrick v. Brown, 2 Freem. 180; 1 Cha. Ca. 49.

But, even admitting this objection, it cannot be extended to a case where the equitable tenant for life, who makes the tenant to the *præcipe*, is legal tenant in fee. The estates are perfectly distinct. He is not legal and equitable tenant for life, but tenant in fee of the legal estate, and tenant for life of the equitable interest(a).

(\*) This point is still important with reference to recoveries already suffered, and therefore the discussion may with propriety retain its place in this treatise. But the whole law as to barring estates tail is by a late statute(b) altered. Fines and recoveries are abolished, and a new mode of unfettering estates in settlement is introduced. As this law will have great influence upon titles, and it must be some time before its provisions can be generally circulated, it may not be improper to introduce them in this place.

By the Act referred to, fines and recoveries are abolished after the 31st December 1833; and(c) persons bound after that day by agreement to levy a fine or suffer a recovery, are enabled to perform their contract without actually levying the one or suffering the other. The Act then gives validity to recoveries, although the bargain and sale to make the tenant to the præcipe was not enrolled in due time(d): and no recovery(e) is to be invalid in consequence of any person having a legal estate not having joined in making the tenant to the præcipe, provided the tenant shall have been made by a person who had an estate in possession not less than for a life, in the rents or surplus after payment of charges thereon, and whether there be any actual surplus or not; and an estate is to be deemed to be in possession notwith-standing any prior leases for lives or years at a rent, or any

<sup>(</sup>a) Marwood v. Turner, 3 P. Wms. 171.

<sup>(</sup>b) 3 & 4 W. 4, c. 74. (c) Sec. 3. (d) Sec. 10. (e) Sec. 11.

<sup>(\*380)</sup> 

term of years without rent. But this is confined by certain exceptions in the Act(f). The object of these excellent provisions is to render valid recoveries already suffered.

The Act then avoids(g) all warranties by tenant in tail against the issue in tail and persons in remainder.

(\*) The Act then(h) provides, that after the 31st December 1833, every actual tenant in tail, whether in possession, remainder, contingency or otherwise, shall have power to dispose of for an estate in fee-simple absolute, or for any less estate, the lands entailed, saving the rights of persons in respect of estates prior to the estate tail. But women who are seised in tail under existing settlements ex provisione viri are prevented from exercising such power of disposition without the assent now required by law; but as to future settlements, the Act of 11 H. 7, c. 20, is repealed. But the power of disposition(i) is prevented from extending to tenants in tail within the 34 & 35 H. 8, or who by any other Act are restrained from barring their estates tail, or to tenants in tail after possibility of issue extinct.

In like manner(k) after the 31st December 1833, power is given to the persons who would have been tenants in tail if the entail had not been barred and converted into a base fee, to dispose of the lands so as to enlarge the base fee into a fee-simple absolute, but not to affect prior estates. But(l) the Act is not to enable any issue, in respect of his hope of succession, to dispose of the entailed property.

The Act then(m) makes a disposition by a tenant in tail, by way of mortgage or for any other limited purpose, an absolute bar in equity and law to the extent of

<sup>(</sup>f) Sec. 12.

<sup>(</sup>g) Sec. 14.

<sup>(</sup>h) Sec. 15.

<sup>(</sup>i) Sec. 18.

<sup>(</sup>k) Sec. 19; and see sec. 39.

<sup>(</sup>l) Sec. 20.

<sup>(</sup>m) Sec. 21.

the estate created, against all persons who under the Act can be barred, notwithstanding any intention to the contrary may be expressed or implied in the deed. But notwithstanding any intention, where only an estate pour auter vie, or for years, or an interest, charge, lien or incumbrance without a term of years, or any greater estate (\*)shall be created, the same shall in equity be a bar only so far as may be necessary to give full effect to the mortgage or charge.

As the old tenant to the *præcipe* could not be reserved under the new plan, the Act proceeds to create a *Protector* of every settlement, whose concurrence in barring estates tail in remainder is required, in order to preserve, under certain modifications, the control of the tenant for life over the remainder-men.

With this view, it is enacted(n), that if at the time when there shall be a tenant in tail under a settlement, there shall be under the same settlement any estate for years determinable on a life, or any greater estate (not being an estate for years) prior to the estate tail, then the owner of the prior or first estate, or who would have been so if no absolute disposition thereof had been made, shall be the protector of the settlement, and shall, for the purposes of the Act, be deemed the owner of such prior estate, although the same may have been charged or incumbered, and although all the rents be exhausted or required for the payment of the incumbrances on such prior estate, and although such prior estate may have been absolutely disposed of by the owner, or by his bankruptcy or insolvency, or by any other act or default of such owner. An estate by the curtesy in respect of the estate tail, or of any prior estate created by the same settlement, is to be deemed a prior estate, and a resulting use or trust to or for the settlor is to be deemed an estate under the same settlement.

Provisions are then made(o) for making each owner of an undivided share the protector of such share, and(p) for making the husband and wife the protector in respect of her prior estate, unless her estate shall by the settlement (\*)have been settled or agreed to be settled to her separate use, in which case she alone is to be the protector; but it is provided(q), that a lease at a rent created or confirmed by a settlement shall not make the owner of it the protector, nor(r) shall any woman in respect of her dower, nor any bare trustee, heir, executor, administrator, or assign, be the protector, but in such cases(s) the person who if such estate did not exist would be the protector shall be such.

But where before the 31st December 1833, an estate under settlement shall have been disposed of, either for valuable consideration or not, the person who in respect of such estate would, if the Act had not been passed, have been the proper person to make the tenant to the præcipe, shall, during the continuance of such estate, be the protector of such settlement; and the Act provides(t) for the case of a disposition of a remainder or reversion in fee on or before the 31st December 1833, and preserves to a bare trustee under any existing settlement, who would have been the proper person to make the tenant to the præcipe, the right as the protector of such settlement(u).

Power is given(x), under certain restrictions, to every settlor to appoint protectors of his settlement; and the Act substitutes(y) the Lord Chancellor in the place of a protector who shall be a lunatic, and the Court of Chan-

- (o) Sec. 23.
- (q) Sec. 26; and see sec. 25.
- (s) Sec. 28.
- (u) Sec. 31.
- (y) Sec. 33, & sec. 48, 49.

- (p) Sec. 24.
- (r) Sec. 27.
- (t) Sec. 30.
- (x) Sec. 32.

cery in the place of a protector who shall be convicted of treason or felony, or of a protector, not being the owner of a prior estate, who shall be an infant, or where it shall be uncertain whether such last-mentioned person be living or dead. The Court of Chancery is also substituted (\*)where the settlor declares that the person who as owner of a prior estate under such settlement, would be entitled to the protector shall not be such protector, and does not appoint any protector in his stead. And also in every other case where there shall be, under a settlement, a prior estate sufficient to qualify a protector, and there shall happen to be no protector, the Court of Chancery is to be the protector.

Having thus provided who shall be the protector, the Act then proceeds to declare in what cases his concurrence shall be necessary.

No actual tenant in tail(z), not having the remainder or reversion in fee immediately expectant on his estate tail, under a settlement where there is a protector, can dispose of the estate to the full extent authorized by the Act, without the consent of the protector, but he may without such consent dispose of the estate against all persons who by force of any estate tail which shall be vested in or might be or have been claimed by him, shall claim the lands. And(a) although the estate be converted into a base fee, yet as long as there is a protector of the settlement, his consent is requisite to the power of disposition given by the Act.

The power of the protector to consent is made absolute; his discretion is absolute and uncontrollable even by a court of equity. Nor can his giving his consent be deemed a breach of trust(b). Nor are the rules of equity in relation to dealings and transactions between a donee of a

<sup>(</sup>z) Sec. 34. (a) Sec. 35. (b) Sec. 36. (\*384)

power and any object of the power in whose favor the same may be exercised, to apply to this case(c).

If a base fee and the remainder or reversion in fee be

If a base fee and the remainder or reversion in fee be united in the same person, and there shall be no intermediate (\*) estate between them, the base fee shall be *ipso* facto enlarged into as large an estate as the tenant in tail, with the consent of the protector, might have created under the Act, if such remainder or reversion had been vested in any other person(d).

The Act then proceeds to provide by what conveyances a tenant in tail shall convey. Every disposition is to be effected by some one of the assurances (not being a will) by which such tenant in tail could have made the disposition of his estate if a fee-simple absolute; but it must be made or evidenced by deed. No disposition by a tenant in tail, resting only in contract either express or implied or otherwise, and whether supported by a valuable or meritorious consideration or not, shall be of any force, nothwithstanding such disposition shall be made by deed. And the concurrence of the husband of every married woman being a tenant in tail, is made necessary(e).

The protector is authorized to give his consent by the same assurance which effects the disposition, or by a separate instrument. If given by a separate instrument, it is to be deemed an unqualified consent, unless the particular assurance is referred to, and his consent confined to that disposition. After having given his consent, he cannot revoke it(f). A married woman being a protector, either alone or jointly with her husband, may consent as a feme sole.

The dispositions and consents are not to operate unless valid in law, for the jurisdiction of equity is altogether excluded(g).

Copyholds are within the Act, but surrenders are to be made by legal tenants in tail, and surrenders or deeds to be made or executed by equitable tenants in tail(h). And the mode in which the protectors are to consent is (\*)particularly pointed out(i); but it is provided, that every deed by which copyholds are disposed of by an equitable tenant in tail, shall be void against any person claiming such lands for valuable consideration, under any subsequent assurance duly entered on the court rolls, unless the deed by the equitable tenant be entered on the rolls before the subsequent assurance shall have been entered.

The Act then alters the laws as to bankrupt tenants in tail, and gives to the Commissioners a power to alien upon the basis of the provisions in the Act, in favor of solvent tenants in tail(k).

And it also repeals the law for relieving persons entitled to entailed estates to be purchased with trustmonies, and applies to the estates to be sold and the monies to be invested (which are treated as if they were the lands to be purchased) the general provisions of the Act(l).

The Act then(m) contains a provision of great importance. Every married woman not being tenant in tail, is enabled by deed to dispose of lands of any tenure, and money subject to be invested in lands, and also to dispose of, release, surrender, or extinguish any estate which she alone, or she and her husband in her right, may have in lands of any tenure, or in any such money; and also to release or extinguish any power which may be vested in or limited or reserved to her in regard to any lands of any tenure, or in any such money, as effectually as if she were a feme sole; but her husband must concur, and the deed

(\*386)

<sup>(</sup>h) Sec. 50 & 53. (i) Sec. 51, 52, 53. (k) Sec. 55. to sec. 69. (l) Sec. 70, 71. (m) Sec. 77.

must be acknowledged in the manner required by the Act, and the provision is not to extend to copyholds in cases where the power is not required.

The Act also contains provisions as to lands in ancient (\*)demesne, renders amendments of fines and recoveries unnecessary, points out the manner in which deeds, consents and assurances are to be inrolled, and contains certain provisions in favor of purchasers, which latter provisions will be found in their proper place in this work(n).

The sweeping away of fines and recoveries is a solid improvement in the law, and the Act of parliament is a masterly performance, and reflects great credit on the learned conveyancer by whom it was framed. But the policy of the provisions in the Act may be doubted. All men's titles must for many years depend upon the law of fines and recoveries; and few will be found in a short time competent to judge of their validity. The substitute for the old law is one of vast complication, introducing a protector in every settlement to check the alienation by tenant in tail in remainder. Whilst we brush away our old books, no one can doubt that the new system, from its complication, will lay the foundation for new ones, and that the construction of the Act in every given case will not be settled but after a long run of litigation, although no doubt, at first, every thing will proceed smoothly. The Author was one of those who thought that the law would have been more simple if it had merely abolished fines and recoveries, and made deeds to declare the uses of fines, and to make tenants to the præcipe in recoveries effectual without actually levying a fine or suffering a recovery.

The Act has effected an important alteration in the law, by making the tenant for life continue to be the protector of a settlement even after he has sold the estate, or it has passed from him by bankruptcy or insolvency. This appears to be unwise. For the Act takes away the control of equity over the protector; declares that his discretion (\*)is absolute; that he cannot commit a breach of trust; and that the doctrines of equity applicable to a donee of a power dealing with an object of the power are not to be applied to him. He may, therefore, make what bargain he pleases with the tenant in tail after the natural check (for such the possession of the first estate may fairly be considered) has been conveyed away. In the case of a bankrupt, he may acquire a great property as against his creditors, and a case may occur in which he may by his concurrence enable the first tenant in tail to bar a subsequent remainder vested by his bankruptcy in his own assignees.

V. It so often becomes necessary to consider in what cases an uninterrupted possession creates a title, that the introduction of a few general observations on the operation of the statutes of limitations, may not be deemed impertinent.

1. Then the statutes of limitations operate by way of bar to the remedy, and not, like the statutes of fines, as a bar to the right(o). Therefore, although a person is barred of one remedy, yet he may pursue any other remedy which may afterwards accrue to him. Thus, where a tenant in tail discontinued for three lives, and the issue in tail was barred of his formedon by the 21 Jac. 1.(p); afterwards by the death of the three tenants for life, a right of entry accrued to the issue, who entered, and his entry was held lawful(q).

<sup>(</sup>o) See Beckford v. Wade, 17 Ves. jun. 87.

<sup>(</sup>p) Ch. 16.

<sup>(</sup>q) Hunt v. Bourne, Lutw. 781; 2 Salk. 422; Com. 124; 1 Bro. P. C. 53.

<sup>(\*388)</sup> 

- 2. It has frequently been thought that the rights of infants, femes covert, persons in prison, and beyond sea, are saved by the act of 32 Hen. 8.(r); but on examination (\*)it will appear, that the savings extended only to persons who labored under any of those disabilities at the time the statute was made(s), (I).
- 3. The saving clause in the act of James(II) only extends to the persons on whom the right first decends; and therefore, when the time once begins to run, nothing can stop it(t)(217). So that on the death of a person in whose life the time first began to run, his heir must enter within the residue of the ten years, although he labored under a disability at the death of his ancestor.

In the late case of Cotterell v. Dutton(u), a tenant in tail died, leaving the issue in tail a feme covert who died under coverture and left issue two sons, both infants; the eldest attained twenty-one and died without issue, leaving

- (r) Ch. 2.
- (s) See Bro. Reading, p. 60.
- (t) Doe v. Jones, 4 T. Rep. 300; Cotterell v. Dutton, 4 Taunt. 826.
- (u) 4 Taunt. 826.

<sup>(</sup>I) In even the last edition of Bacon's Abridgment, it is stated generally, that the act of 32 Hen. VIII. hath the usual saving for infants, femes covert, persons in prison, and beyond the sea.

<sup>(</sup>II) Note, Dublin, or any other place in Ireland, is a place within the meaning of the saving of the rights of persons beyond the seas. Anon. 1 Show. 90.

<sup>(217)</sup> See Dow v. Warren, 6 Mass. Rep. 328. Bunce v. Wolcott, 2 Conn. Rep. 27. Griswold v. Butler, 3 Conn. Rep. 227. and see Bush v. Bradley, 4 Day, 298. Sanford v. Button, 4 Day, 310. See also, Peck v. Randall, 1 Johns. Rep. 165. Hall's Les. v. Vandegrift, 3 Binn. 374. Demarest v. Wyncoop, 3 Johns. Ch. Rep. 129. Walden v. Gratz' heirs, 1 Wheat. 292, 296. Hudson v. Hudson, 6 Munf. 352. Den v. Mulford, 1 Hayw. 311. Anon. Id. 416. Pearce v. House, 2 Tayl. 305. Faysoux v. Prather, 1 Nott & M'Cord, 296. Adamson v. Smith, 2 Rep. Con. Ct. 269. Euger v. The Commonwealth, 4 Mass. Rep. 182. Mooers v. White, 6 Johns. Ch. Rep. 372.

his brother under age, who did not sue forth his writ of formedon within ten years after he attained twenty-one, and more than twenty years had elapsed after the right had first descended. It was held that he was barred by the statute. The ground of this decision was, that the time began to run against the eldest son when he attained twenty-one, and no subsequent disability could stop it; therefore he and his heirs had only ten years from his attainment of twenty-one. This case overruled a notion which had been entertained by some, that issue in tail have distinct and successive rights under the statute, and were not to be barred like the heirs of feesimple estates. This, however, was decided otherwise. (\*)Mr. Justice Heath said, that there was no such difference between the issue in tail and other heirs, as was supposed; formedon in the descender was expressly mentioned in the first clause of the statute: and the point was expressly decided in the same way in the later case of Tolson v. Kaye(x).

In the case of a fine, it was formerly thought, that if a person died under a disability, his heir was excepted out of the statute of fines, by the proviso(y); although the contrary has been determined by a modern case(z). In the statute of James, the Legislature being aware of this point, expressly provided for the death of the person to whom the first right should descend; and, therefore, where a person to whom the right first descended, dies under a disability, his heir must enter within ten years after his death(a)(218).

(x) 3 Brod. & Bing. 217.

(y) See Cruise on Fines, 258, and the cases there cited.

(z) Dillon r. Leman, 2 H. Black. 584.

(a) See Jenkins, 4 Cent. pl. 97; Doc v. Jesson, 6 East, 80.

<sup>(218)</sup> See Smith v. Burtis, 9 Johns. Rep. 181. Demarest v. Wyncoop, 3 Johns. Ch. Rep. 136, 137.

<sup>(\*390)</sup> 

In the case of Doe v. Jesson(b), the person upon whom the right first descended was presumed to have died in 1785, under a disability, leaving his heir also under a disability. The disability ceased in 1792, but the ejectment was not brought till 1804; more than twenty years had elapsed since the death of the person last seised, and more than ten years had elapsed after the cesser of the disability of the plaintiff; and the Court determined that the ejectment was out of time. Lord Ellenborough held that the person through whom the lessor of the plaintiff claimed, being under a disability at his father's death, when his title first accrued, and dying under that disability, the proviso in the second clause of the statute (where resort is to be had to it, to extend the period for making an entry beyond the twenty years) (\*)required the lessor of the plaintiff, as heir to her brother, to make her entry within ten years after his death. The word death in that clause must mean and refer to the death of the person to whom the right first accrued, and whose heir the claimant is, and the statute meant that the heir of every person, to which person a right of entry had accrued during any of the disabilities there stated, should have ten years from the death of his ancestor, to whom the right first accrued during the period of disability, and who died under such disability (notwithstanding the twenty years from the first accruing of the title to the ancestor should have before expired). Mr. Justice Lawrence also gave his opinion that the ten years to the heir run from the death of the party dying under the disability.

It will appear that it was not necessary for the Court to decide from what period the ten years should run; for more than ten years had elapsed from the time the heir who brought the ejectment attained twenty-one, when

<sup>(</sup>b) 6 East, 80.

her disability ceased. In the late case of Cotterell v. Dutton(c), where this doctrine was stated, the Court was of opinion that the heir has ten years after the disability ceases, not from the death of the ancestor who died under a disability. "The ten years do not run at all while there is a continuance of disabilities" (219). This certainly appears to be the true construction of the statute, and it is the construction which has invariably been adopted in practice.

It seems that where no account can be given of a person within the exceptions in the Act, he will be presumed to be dead at the expiration of seven years from the last

account of him(d).

The disability of one coparcener will not preserve the (\*)title of the other, who must enter within twenty years after the title accrues, although during the whole time her coparcener labored under a disability (e)(220).

4. It is generally conceived, that a possession for sixty years creates a good title against all the world. Thus Judge Jenkins(f) lays it down, without qualification, "that a peaceable possession for sixty years makes a right; for 21 Jac. 1. c. 16, takes away the entry and assize; 32 Hen. 8, takes away the writ of right and the formedon." So Mr. Justice Blackstone says(g), "that the possession of lands in fee-simple and uninterruptedly for sixty years, is at present a sufficient title against all

<sup>(</sup>c) 4 Taunt. 826.

<sup>(</sup>d) Doe v. Jesson, ubi sup.

<sup>(</sup>e) Roe v. Rowlston, 2 Taunt. 441.

<sup>(</sup>f) 1 Cent. pl. 49.

<sup>(</sup>g) 3 Com. 196.

<sup>(219)</sup> See Jackson v. Sellick, 8 Johns. Rep. 202. 2d edit.

<sup>(220)</sup> See Sanford v. Button, 4 Day, 310. The rule is the same in respect to tenants in common. Doolittle v. Blakesley, 4 Day, 265, 465. Bryan v. Hinman, 5 Day, 211. See Riden v. Frion, 2 Murph. 577. (\*392)

the world, and cannot be impeached by any dormant claim whatsoever" (221). This, however, Mr. Christian remarks, in a note to the above passage, is far from being universally true; for an uninterrupted possession for sixty years will not create a title, where the claimant or demandant had no right to enter within that time; as where an estate in tail, for life, or for years, continues above sixty years, still the reversioner may enter and recover the estate.

Perhaps this remark is not sufficiently pointed. Blackstone certainly did not mean, that the lawful possession, during sixty years, of a tenant in tail, for life, or for years, would operate as a bar to the reversioner's title, but he alluded to a clear adverse possession for sixty years.

However, even in this light, his position admits of exceptions. It is possible that an estate may be enjoyed adversely for hundreds of years, and may at last be recovered by a remainder-man. For instance, suppose an estate to be limited to one in tail, with remainder over to another in fee, and the tenant in tail to be barred of his (\*)remedy by the statutes of limitations, it is evident that, as his estate subsists, the remainder-man's right of entry cannot take place until the failure of issue of the tenant in tail, which may not happen for an immense number of years.

This doctrine is illustrated by the great case of Taylor v. Horde(h), where an estate was settled on several persons successively in tail; remainder to A, in fee; and one of the remainder-men in tail, being out of possession, brought an ejectment, which was held to be barred by the statute of limitations. Afterwards all the tenants in tail died without issue, and the then heir at law of A, brought an ejectment, within twenty years from the time his

<sup>(</sup>h) 1 Burr. 60; 5 Bro. P. C. 247; Cowper, 689.

<sup>(221)</sup> See Morris' Les. v. Vanderen, 1 Dall. 67.

remainder fell into possession, and he recovered the estate(222).

- 5. After passing the act of 32 Henry 8, and before that of the 21 Jac. 1, although a man had been out of possession of land for sixty years, yet if his entry was not tolled, he might enter and bring an action of his own possession(i). Some writers have thought this still to be law(k), but the rule in this respect was altered by the statute of James; by which no person can now enter except within twenty years after his title accrues.
- 6. The rule in equity, that the statute of limitations does not bar a trust-estate, holds only as between cestui que trust and trustee, not between cestui que trust and trustee on one side, and strangers on the other(223); for that would be to make the statute of no force at all, because there is hardly an estate of consequence without such a trust, and so the act would never take place.

Therefore, where a cestui que trust and his trustee are (\*)both out of possession for the time limited, the party in possession has a good bar against both(l)(224).

7. Although the statute cannot, as between the trustee and cestui que trust, operate as a bar to the latter, yet the

(i) See Bevill's case, 4 Co. 11 b.

(k) See Wood's Inst. 557; and Christian's note to 3 Black. Com. 196.

(l) Per Lord Hardwicke, in casu Llewellyn v. Mackworth, Barnard. Rep. Cha. 445; 15 Vin. Abr. 125, n. to pl. 1; and see Townsend v. Townsend, 1 Bro. C. C. 550; Clay v. Clay, 3 Bro. C. C. 639, n.; Ambl. 645; Hercy v. Ballard, 4 Bro. C. C. 469; and Harmood v. Oglander, 6 Ves. jun. 199; 8 Ves. jun. 106; Hovenden v. Lord Annesley, 2 Scho. & Lef. 629.

<sup>(222)</sup> See Jackson v. Schoonmaker, 4 Johns. Rep. 390. 402. Hall's Les. v. Vandegrift, 3 Binn. 374.

<sup>(223)</sup> See Wanburzee v. Kennedy, 4 Des. 474. Decouche v. Savetier, 3 Johns. Ch. Rep. 190. Goodrich v. Pendleton, 3 Johns. Ch. Rep. 384.

<sup>(224)</sup> See Decouche v. Savetier, 3 Johns. Ch. Rep. 216. Goodrich
v. Pendleton, 3 Johns. Ch. Rep. 390. Gist v. Cattell, 2 Des. 53.
(\*394)

trustee may, in some cases, be barred by the possession of the cestui que trust, or those claiming under him(m). A cestui que trust is as a tenant at will to the trustee, and his possession is the possession of the trustee(n); and therefore, unless under very particular circumstances, time could not operate as a bar(o). Where a cestui que trust sells or devises the estate, and the vendee or devisee obtains possession of the title-deeds, and enters, and does no act recognising the trustee's title, there is great reason to contend that this is a disseisin of the trustee, and, consequently, that the statute will operate from the time of such entry. This is a point which daily occurs in practice; but it rarely happens, that a purchaser can be advised to dispense with the conveyance of a legal estate, where the defect will appear on the abstract when he sells. And where there has been any dealing on the legal estate, and it has been recently noticed in the title-deeds as a subsisting interest, it is clear that a purchaser must consider it as such(p).

8. The statutes of limitations certainly cannot operate as between *cestuis que trust*; but it seems that equity, in (\*)analogy to the statute, will hold time a bar(q); and indeed that equitable rights in general will, by the like analogy, be affected by time in the same manner as legal estates(r)(225).

<sup>(</sup>m) See Lord Portsmouth v. Lord Effingham, 1 Ves. 430; Harmood v. Oglander, 6 Ves. jun. 199; 8 Ves. jun. 106. See 2 Mer. 360.

<sup>(</sup>n) See 1 Ventr. 329.

<sup>(</sup>o) See 3 Mod. 149; Earl of Pomfret v. Lord Windsor, 2 Ves. 472; Keene v. Deardon, 8 East, 248; Smith v. King, 16 East, 283.

<sup>(</sup>p) See Goodtitle v. Jones, 7 Term Rep. 47.

<sup>(</sup>q) See Harmood v Oglander, ubi sup.

<sup>(</sup>r) See 1 Atk. 476; and Stackhouse v. Barnston, 10 Ves. jun. 466;

<sup>(225)</sup> See Arden v. Arden, 1 Johns. Ch. Rep. 313. Decouche v. Savetier, 3 Johns. Ch. Rep. 190.

This is exemplified, in some degree, by the rules respecting an equity of redemption, which is a mere creature

of the Court(s).

In Clay v. Clay (t), Lord Camden laid down this doctrine very clearly. He said, "as often as Parliament has limited the time of actions and remedies, to a certain period, in legal proceedings, the Court of Chancery adopted that rule, and applied it to similar cases in equity (226). For when the Legislature has fixed the time at law, it would have been preposterous for equity (which by its own proper authority always maintained a limitation) to countenance laches beyond the period that law had been confined to by Parliament. And therefore, in all cases where the legal right has been barred by Parliament, the equitable right to the same thing has been concluded by the same bar."

In Beckford v. Wade(u), Sir William Grant, in delivering judgment, said, that it is certainly true that no time bars a direct trust as between cestui que trust and trustee; but if it was meant to be asserted that a court of equity allows a man to make out a case of constructive trust, at any distance of time after the facts and circumstances (\*)happened out of which it arises, he was not aware that there was any ground for a doctrine so fatal to the security of property as that would be; so far from it, that not only in circumstances where the length of time would render it extremely difficult to ascertain the true

Hovenden v. Lord Annesley, 2 Scho. & Lef. 630; Lord Egremont v. Hamilton, 1 Ball & Beatty, 516.

<sup>(</sup>s) White v. Ewer, 2 Ventr. 340; Pearson v. Pulley, 1 Cha. Ca. 109; Jenner v. Tracey, and Belch v. Harvey, 3 P. Wms. 287, n. See a full note of this case, Appendix, No. 16.

 <sup>(</sup>t) 3 Bro. C. C. 639, n.; Ambl. 645; and see Ex parte Dewdney,
 15 Ves. jun. 496; Medlicott v. O'Donel, 1 Ball & Beatty, 156.

<sup>(</sup>u) 17 Ves. jun. 97. See 2 Hargr. Jur. Exc. p. 394.

<sup>(226)</sup> See Demarest v. Wyncoop, 3 Johns. Ch. Rep. 129. (\*396)

state of the fact, but where the true state of the fact is easily ascertained, and where it is perfectly clear that relief would originally have been given upon the ground of constructive trust, it is refused to the party who, after long acquiescence, comes into a court of equity to seek that relief(227).

And it seems that even in cases of fraud, where the facts constituting the fraud are known, where there is no subsisting trust or continuing influence, the same principle will apply (x)(228.)

It was held by Sir William Grant, that whilst the equity of redemption subsists, the question to whom it belongs must remain open: and therefore mere possession without title would not give any person a right to redeem(y)(229). The right belonged to him who showed a title, although he had been out of possession upwards of twenty years. But Sir Thomas Plumer decided otherwise, and his decision was affirmed in the House of Lords(z). And it seems that unless in the case of disability, twenty years adverse possession is a bar to relief in equity(a).

The legal provisions have been so strictly adhered to, that persons laboring under any of the disabilities specified in the statute of limitations, have been allowed the

<sup>(</sup>x) 1 Ball & Beatty, 166.

<sup>(</sup>y) Cholmondeley v. Clinton, 2 Mer. 173.

<sup>(</sup>z) 2 Jac. & Walk. 1, 189 n.; and see Tweddell v. Tweddell, 1 Turner, 11, 12.

<sup>(</sup>a) See Price v. Copner, 1 Sim. & Stu. 347.

<sup>(227)</sup> See Gist v. Cattell's heirs, 2 Des. 53, 55. Wamburzee v. Kennedy, 4 Des. 474, 479. Spotswood v. Dundridge, 4 Hen. & Munf. 139. Redwood v. Reddick, 4 Munf. 225.

<sup>(228)</sup> See Wamburzee v. Kennedy, 4 Des. 479. Cook v. Darby, 4 Munf. 444.

<sup>(229)</sup> See Grant v. Duanc, 9 Johns. Rep. 591. on appeal.

same as they would be entitled to in the case of a legal

 $\operatorname{claim}(b)(230).$ 

(\*)9. These observations may be closed by observing, that few cases occur in which a title depending on the statute of limitations can be recommended. The bare receipt of rent is no ouster, for it is a contradiction in terms, that a man by wrong should have my right(c); so the non-payment of rent is no ouster, and therefore the operation of the statute must frequently be prevented by the existence of a lease granted by the person whose interest, or the interest of persons claiming under him, is wished to be barred. So(d) there may be a case where the circumstance of concealing a deed shall prevent the statute from barring; but then it must be a voluntary and fraudulent detaining; for to say that merely having an old deed in one's possession shall deprive a man of the benefit of the act, is going too far, and would be a harsh

<sup>(</sup>b) Lytton v. Lytton, 2 Bro. C. C. 441. Two cases on this point were for a long time depending, Pimm v. Goodwin, before Lord Eldon, and Blake's case before Lord Manners, in Ireland. See 2 Mer. 240; Blake v. Foster, 2 Ball & Beat. 565; Harrison v. Hollins, 1 Sim. & Stu. 471.

<sup>(</sup>c) Gilb. Ten. 97. See acc. Goodright v. Jones, Cruise on Fines, 3d edit. 295; Doe v. Danvers, 7 East, 299; and see Orrell v. Maddox, Runnington's Eject. 458; Saunders v. Lord Annesley, 2 Scho. & Lef. 73. See and consider Hovenden v. Lord Annesley, 2 Scho. & Lef. 623.

<sup>(</sup>d) Per Lord Hardwicke in casu Llewellyn v. Mackworth, Barnard. Rep. Cha. 445; 15 Vin. Abr. 126, pl. 8; 2 Eq. Ca. Abr. 579, pl. 9; and see Dormer v. Parkhurst, 3 Atk. 124. See also Snell v. Silcock, 5 Ves. jun. 469; Bowles v. Stewart, 1 Schoale's & Lefroy's Rep. 209; Bond v. Hopkins, ib. 413; Hovenden v. Lord Annesley, 2 Scho. & Lef. 607.

<sup>(230)</sup> The construction of the statute of limitations is the same in equity as at law. See *Demarest* v. *Wyncoop*, 3 Johns. Ch. Rep. 129, 139. *Lamar* v. *Jones*, 3 Har. & M'Hen. 329. *Kane* v. *Bloodgood*, 7 Johns. Ch. Rep. 90.

<sup>(\*397)</sup> 

construction of a statute made for the quieting of possessions.

Thus the law stood before the late important Act of 3 & 4 Wil. 4, c. 27. It is seldom possible to understand a law which repeals a former one and substitutes new provisions, unless we have a competent knowledge of the law repealed. It has, therefore, independently of the (\*)savings in the Act, been thought useful to retain the foregoing short account of the old law as a fit introduction to the new one.

By the Act referred to it is enacted, that after the 31st day of December 1833, no person shall make an entry or distress or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress or to bring such action shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress or to bring such action shall have first accrued to the person making or bringing the same(I).

<sup>(</sup>I) The words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows; (that is to say,) the word "land" shall extend to manors, messuages, and all other corporeal hereditaments whatsoever, and also to tithes (other than tithes belonging to a spiritual or eleemosynary corporation sole), and also to any share, estate, or interest in them or any of them, whether the same shall be a freehold or chattel interest, land whether freehold or copyhold, or held according to any other tenure; and the word "rent" shall extend to all heriots, and to all services and suits for which a distress may be made, and to all annuities and periodical sums of money charged upon or payable out of any land (except moduses or compositions belonging to a spiritual or eleemosynary corporation sole); and the person through whom another (\*398)

- (\*) And it is enacted, that in the construction of the Act the right to make an entry or distress or bring an action to recover any land or rent shall be deemed to have first accrued at such time as hereinafter is mentioned; (that is to say)
- 1. When the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall while entitled thereto have been dispossessed, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received.
- 2. And when the person claiming such land or rent shall claim the estate or interest of some deceased person who shall have continued in such possession or receipt in respect of the same estate or interest until the time of his death, and shall have been the last person entitled to such estate or interest who shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time of such death.

person is said to claim shall mean any person by, through, or under, or by the act of whom, the person so claiming became entitled to the estate or interest claimed, as heir, issue in tail, tenant by the curtesy of England, tenant in dower, successor, special or general occupant, executor, administrator, legatee, husband, assignee, appointee, devisee, or otherwise, and also any person who was entitled to an estate or interest to which the person so claiming, or some person through whom he claims, became entitled as lord by escheat; and the word "person" shall extend to a body politic, corporate, or collegiate, and to a class of creditors or other persons, as well as an individual; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male; sect. 1.

- 3. And when the person claiming such land or rent shall claim in respect of an estate or interest in possession granted, appointed, or otherwise assured by any instrument (other than a will) to him, or some person through whom he claims, by a person being in respect of the same estate or interest in the possession or receipt of the profits of the land, or in the receipt of the rent, and no person entitled under such instrument shall have been in such possession or receipt, then such right shall be deemed to have first (\*)accrued at the time at which the person claiming as aforesaid, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument.
- 4. And when the estate or interest claimed shall have been an estate or interest in reversion or remainder, or other future estate or interest, and no person shall have obtained the possession or receipt of the profits of such land or the receipt of such rent in respect of such estate or interest, then such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession.
- 5. And when the person claiming such land or rent, or the person through whom he claims, shall have become entitled by reason of any forfeiture or breach of condition, then such right shall be deemed to have first accrued when such forfeiture was incurred or such condition was broken(e).
- 6. But when any right to make an entry or distress or to bring an action to recover any land or rent by reason of any forfeiture or breach of condition shall have first accrued in respect of any estate or interest in reversion or remainder, and the land or rent shall not have been recovered by virtue of such right, the right to make an entry or distress or bring an action to recover such

land or rent shall be deemed to have *first* accrued in respect of such estate or interest at the time when the same shall have become an estate or interest in possession, as if no such forfeiture or breach of condition had happened (f).

- 7. And a right to make an entry or distress or to bring an action to recover any land or rent shall be deemed to have first accrued, in respect of an estate or interest in (\*)reversion, at the time at which the same shall have become an estate or interest in possession by the determination of any estate or estates in respect of which such land shall have been held, or the profits thereof or such rent shall have been received, notwithstanding the person claiming such land, or some person through whom he claims, shall, at any time previously to the creation of the estate or estates which shall have determined, have been in possession or receipt of the profits of such land, or in receipt of such rent, so that the remainderman is not bound to enter for a forfeiture until his estate fall into possession, nor is his right affected by a possession by him, or any person through whom he claims, previously to the creation of the estate which shall have determined(g).
- 8. An administrator shall be deemed to claim as if there had been no interval of time between the death of such deceased person and the grant of the letters of administration( $\hbar$ ).
- 9. And when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress or bring an action to recover such land or rent shall be deemed to have first accrued either at the determination of such tenancy, or at the ex-

<sup>(</sup>f) Sec. 4. (g) Sec. 5. (ħ) Sec. 6. (\*401)

piration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined: provided that no mortgagor or cestui que trust shall be deemed to be a tenant at will to his mortgagee or trustee(i).

10. And when any person shall be in possession or in receipt of the profits of any land, or in receipt of any (\*) rent, as tenant from year to year or other period, without any lease in writing, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress or to bring an action to recover such land or rent shall be deemed to have first accrued at the determination of the first of such years or other periods, or at the last time when any rent payable in respect of such tenancy shall have been received (which shall last happen)(j).

11. And when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, by virtue of a lease in writing, by which a rent amounting to the yearly sum of 20s. or upwards shall be reserved, and the rent reserved by such lease shall have been received by some person wrongfully claiming to be entitled to such land or rent in reversion immediately expectant on the determination of such lease, and no payment in respect of the rent reserved by such lease shall afterwards have been made to the person rightfully entitled thereto, the right of the person entitled to such land or rent, subject to such lease, or of the person through whom he claims, to make an entry or distress or to bring an action after the determination of such lease shall be deemed to have first accrued at the time at which the rent reserved by such lease was first so received by the person wrongfully claiming as aforesaid; and no such right shall be deemed to have first accrued

upon the determination of such lease to the person right-

fully entitled(k).

The Act then takes away constructive possession merely by reason of having made an entry, and destroys the effect of continual claim in preserving any right, and provides that the possession of one coparcener, joint (\*)tenant or tenant in common, shall not be deemed to have been the possession of the others(l).

And it is enacted, that the possession of a younger brother or other relation of the heir shall not be deemed

to be the possession of the heir himself(m).

But that when any acknowledgment of the title of the person entitled to any land or rent shall have been given to him or his agent in writing signed by the person in possession or in receipt of the profits of such land, or in receipt of such rent, then such possession or receipt of or by the person by whom such acknowledgment shall have been given shall be deemed to have been the possession or receipt of or by the person to whom or to whose agent such acknowledgment shall have been given at the time of giving the same, and the right of such last-mentioned person, or any person claiming through him, to make an entry or distress or bring an action to recover such land or rent shall be deemed to have first accrued at the time at which such acknowledgment, or the last of such acknowledgments was given(n).

And it is provided, that when no such acknowledgment shall have been given before the passing of the Act, and the possession or receipt of the profits of the land, or the receipt of the rent, shall not at the time of the passing of the Act have been adverse to the right or title of the person claiming to be entitled thereto, then

<sup>(</sup>k) Sec. 9.

<sup>(</sup>m) Sec. 13.

<sup>(</sup>l) Sec. 10, 11, 12. (n) Sec. 14.

<sup>(\*403)</sup> 

such person, or the person claiming through him, may, notwithstanding the period of twenty years before limited shall have expired, make an entry or distress or bring an action to recover such land or interest at any time within five years next after the passing of the Act(o).

(\*)And if at the time at which the right of any person to make an entry or distress or bring an action to recover any land or rent shall have first accrued as aforesaid such person shall have been under any of the disabilities hereinafter mentioned, (that is to say,) infancy, coverture, idiotcy, lunacy, unsoundness of mind, or absence beyond seas, then such person, or the person claiming through him, may, notwithstanding the period of twenty years before limited shall have expired, make an entry or distress or bring an action to recover such land or rent at any time within ten years next after the time at which the person to whom such right shall first have accrued as aforesaid shall have ceased to be under any such disability, or shall have died (which shall have first happened) (p).

But even in case of disabilities, no action can be brought but within forty years next after the time at which such right shall have first accrued, although the allowed term of ten years shall not have  $\exp(q)$ . Nor is any time beyond the period of twenty years, or the period of ten years allowed by reason of any disability of any other person, or in other words, a succession of disabilities does not extend the time(r).

No part of Great Britain and Ireland, nor the islands of Man, Guernsey, Jersey, Alderney, or Sark, nor any island adjacent to any of them (being part of the dominions of his Majesty), shall be deemed to be beyond seas within the meaning of the Act(s).

<sup>(</sup>o) Sec. 15.

<sup>(</sup>q) Sec. 17. (s) Sec. 19.

<sup>(</sup>p) Sec. 16.

<sup>(</sup>r) Sec. 15.

The Act then provides that in certain cases the bar shall operate as well against other estates of the claimant as against those in remainder:

- 1. When the right to an estate in possession is barred (\*)by the lapse of time, and such person shall at any time during the said period have been entitled to any other estate, interest, right or possibility, in reversion, remainder or otherwise, in or to the same land or rent, no entry, distress or action shall be made or brought by such person, or any person claiming through him, to recover such land or rent, in respect of such other estate, interest, right or possibility, unless in the mean time such land or rent shall have been recovered by some person entitled to an estate, interest or right which shall have been limited or taken effect after or in defeasance of such estate or interest in possession(t).
- 2. And when the right of a tenant in tail shall have been barred by reason of the same not having been made or brought within the period before limited, no entry, distress or action shall be made or brought by any person claiming any estate, interest or right which such tenant in tail might lawfully have barred (u).
- 3. And when a tenant in tail shall have died before the expiration of the period before limited, no person claiming any right which such tenant in tail might lawfully have barred shall make an entry or distress or bring an action but within the period during which, if such tenant in tail had so long continued to live he might have made such entry or distress or brought such action(x).
- 4. And when a tenant in tail shall have made an assurance which shall not operate to bar an estate, to take effect after or in defeasance of his estate tail, and any person shall by virtue of such assurance, at the time of the execution thereof, or at any time afterwards, be in posses-

<sup>(</sup>t) Sec. 20. (\*405)

sion or receipt of the profits of such land, or in the receipt of such rent, and the same person, or any other person whatsoever (other than some person entitled to (\*) such possession or receipt in respect of an estate which shall have taken effect after or in defeasance of the estate tail), shall continue or be in such possession or receipt for the period of twenty years next after the commencement of the time at which such assurance, if it had then been executed by such tenant in tail or the person who would have been entitled to his estate tail if such assurance had not been executed, would, without the consent of any other person, have operated to bar such estate or estates as aforesaid, then at the expiration of such period of twenty years such assurance shall be effectual as against any person claiming any right to take effect after or in defeasance of such estate tail(y).

It is then enacted, that after the said 31st day of December 1833 suits in equity shall be confined to the period allowed for actions at law(z). And when any land or rent shall be vested in a trustee upon any express trust, the right of the cestui que trust, or any person claiming through him, to bring a suit against the trustee, or any person claiming through him, to recover such land or rent, shall be deemed to have first accrued at and not before the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming through him(a). But in every case of a concealed fraud the right of any person to bring a suit in equity for the recovery of any land or rent of which he, or any person through whom he claims, may have been deprived by such fraud, shall be deemed to have first accrued at and not before the time at which such fraud shall or with reasonable diligence

<sup>(</sup>y) Sec. 23.

<sup>. (</sup>z) Sec. 24.

<sup>(</sup>a) Sec. 25. (\*406)

might have been first known or discovered; provided that nothing in this clause contained shall enable any owner of lands or rents to have a suit in equity for the (\*)recovery of such lands or rents, or for setting aside any conveyance of such lands or rents, on account of fraud, against any bona fide purchaser for valuable consideration who has not assisted in the commission of such fraud, and who at the time that he made the purchase did not know and had no reason to believe that any such fraud had been committed(b).

And it is provided, that nothing in the Act contained shall be deemed to interfere with any rule or jurisdiction of courts of equity in refusing relief on the ground of acquiescence or otherwise to any person whose right to bring a suit may not be barred by virtue of this Act(c).

The existing rule as to mortgagees in possession is then adopted. The mortgagor is to be barred at the end of twenty years from the time of taking possession or from the last written acknowledgment; and when there shall be more than one mortgagor, such acknowledgment, if given to any of such mortgagors, or his or their agent, shall be effectual; but where there shall be more than one mortgagee, such acknowledgment, signed by one or more of such mortgagees, shall be effectual only as against the party or parties signing as aforesaid; and where such of the mortgagees as shall have given such acknowledgment shall be entitled to a divided part of the land or rent comprised in the mortgage, or some interest therein, and not to any ascertained part of the mortgaged money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent on payment, with interest, of the part of the mortgage money which shall bear the same proportion to the whole of the mortgage money as the value of such divided part of the

<sup>(\*407) (</sup>b) Sec. 26. (c) Sec. 27.

land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage(d).

(\*) The Act then passes to church property. It prohibits any spiritual or eleemosynary corporation sole from recovering unless within two incumbencies and six years after a third person shall have been appointed, or within sixty years if those periods shall not amount to sixty years(e). And it enacts, that no advowson shall be recovered after the expiration of the period during which three clerks in succession shall have held the same, all of whom shall have obtained possession thereof adversely to the right of presentation or gift of such person, or of some person through whom he claims, if the times of such incumbencies taken together shall amount to the full period of sixty years; and if not, then for the full period of sixty years in the whole (f). But it is provided, that incumbents by reason of a lapse shall be deemed to have obtained possession adversely to the right of presentation or gift of such patron as aforesaid; but incumbency, in consequence of promotion to a bishoprick, shall, for the purposes of the Act, be deemed a continuation of the incumbency of the clerk so made bishop, or in other words, the first shall be within the provision and the latter not(g). And every patron by virtue of any estate, interest or right which the owner of an estate tail in the advowson might have barred, shall be deemed to be a person claiming through the person entitled to such estate tail, and the right to bring any quare impedit, action or suit shall be limited accordingly(h). But no advowson shall be recovered after one hundred years from the time at which a clerk shall have obtained possession of such benefice adversely to the right of presentation of such person, or of some person through whom he claims,

<sup>(</sup>d) Sec. 28.

<sup>(</sup>e) Sec. 29.

<sup>(</sup>f) Sec. 30.

<sup>(</sup>g) Sec. 31.

<sup>(</sup>h) Sec. 32.

<sup>(\*408)</sup> 

or of some person entitled to some preceding estate or (\*)interest, or undivided share, or alternate right of presentation or gift, held or derived under the same title, unless a clerk shall subsequently have obtained possession of such benefice on the presentation or gift of the person so claiming, or of some person through whom he claims, or of some other person entitled in respect of an estate, share or right held or derived under the same title(i).

And the Act then provides, that at the determination of the period limited by the Act to any person for making an entry or distress, or bringing any writ of quare impedit or other action or suit, the right and title of such person to the land, rent or advowson for the recovery whereof such entry, distress, action or suit respectively might have been made or brought within such period, shall be extinguished (k). This was a proper provision, as under the old law it was considered that although the remedy was barred, the estate did not cease. The receipt of the rent payable by any tenant from year to year, or other lessee, is as against such lessee or any person claiming under him (but subject to the lease), made the receipt of the profits of the land for the purposes of the Act(l).

The Act then proceeds to enact, that all real and mixed actions (except for dower, or a quare impedit, or an ejectment), and all plaint (except for freebench), shall cease after the 31st day of December 1834(m). But it is provided, that when on the said 31st day of December 1834, any person who shall not have a right of entry to any land shall be entitled to maintain any such writ or action as aforesaid in respect of such land, such writ or action may be brought at any time before the 1st day (\*) of June 1835, in case the same might have been

<sup>(</sup>i) Sec. 33.

<sup>(</sup>l) Sec. 35.

<sup>(\*409) (\*410)</sup> 

<sup>(</sup>k) Sec. 34.

<sup>(</sup>m) Sec. 36.

brought if the Act had not been made, notwithstanding the period of twenty years before limited shall have expired(n). And it is also provided, that when, on the said 1st day of June 1835, any person whose right of entry to any land shall have been taken away by any descent cast, discontinuance or warranty, might maintain any such writ or action as aforesaid in respect of such land, such writ or action may be brought after the said 1st day of June 1835, but only within the period during which by virtue of the provisions of the Act an entry might have been made upon the same land by the person bringing such writ or action if his right of entry had not been so taken away(o).

It is then enacted, that no descent cast, discontinuance or warranty which may happen or be made after the said 31st day of December 1833, shall toll or defeat any right of entry or action for the recovery of land(p). And that after the said 31st day of December 1833, no action or suit or other proceeding shall be brought, to recover any money secured upon any land or rent, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the mean time some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto or his agent; and in such case the twenty years to run from such payment or acknowledgment(q).

(\*) After the said 31st day of December 1833, no arrears of dower, nor any damages on account of such arrears,

<sup>(</sup>n) Sec. 37.

<sup>(</sup>p) Sec. 39.

<sup>(</sup>o) Sec. 38.

<sup>(</sup>q) Sec. 40.

shall be recovered or obtained by any action or suit for a longer period than six years next before the commencement of such action or suit(r). And after that day no arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest(I), shall be recovered but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent: provided nevertheless, that where any prior mortgagee or other incumbrancer shall have been in possession of any land, or in the receipt of the profits thereof, within one year next before an action or suit shall be brought by any person entitled to a subsequent incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover the arrears of interest which shall have become due during the whole time that such prior incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the term of six years(s).

The Act is extended to the spiritual court(t). But it is not to extend to Scotland; nor is it, so far as it relates to any right to present to or bestow any church, (\*)vicarage, or other ecclesiastical benefice—to extend to Ireland(u).

(r) Sec. 41.

(s) Sec. 42.

(t) Sec. 43.

(u) Sec. 44.

<sup>(</sup>I) I have forborne from making any observation on the particular clauses, as it is too late; but this clause should be modified without loss of time, or the grossest injustice will be committed upon the just rights of legatees and others, particularly infant legatees.

<sup>(\*412)</sup> 

All the provisions regarding prescriptions, &c. and limitations of time, were not contained in one act or framed by the same hand. For the use of the real property lawyer, it is still necessary to refer to the leading provisions of the 2 & 3 Wil. 4, c. 71 (I), by which it is enacted, that no claim which may be lawfully made at the common law, by custom, prescription or grant, to any right of common or other profit or benefit to be taken and enjoyed from or upon any land of the King, or par-cel of the duchy of Lancaster or of the duchy of Corncel of the duchy of Lancaster or of the duchy of Cornwall, or of any ecclesiastical or lay person, or body corporate, (except such matters and things as are therein specially provided for, and except tithes, rent and services,) shall, where such right, profit or benefit shall have been actually taken and enjoyed by any person claiming right thereto without interruption for the full period of thirty years, be defeated or destroyed by showing only that such right, profit or benefit was first taken or enjoyed at any time prior to such period of thirty years, but nevertheless such claim may be defeated in any other way by less such claim may be defeated in any other way by which the same is now liable to be defeated; and when such right, profit or benefit shall have been so taken and enjoyed as aforesaid for the full period of sixty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing (v).

(\*)And that no claim which may be lawfully made at the common law, by custom, prescription or grant, to any way or other easement, or to any watercouse, or the use of any water, to be enjoyed or derived upon, over or from any land or water of the King, or parcel of the duchy of Lancaster or of the duchy of Cornwall, or being

<sup>(</sup>v) Sec. 1.

<sup>(</sup>I) It does not extend to Scotland or Ircland.—Scc. 9. (\*413)

the property of any ecclesiastical or lay person, or body corporate, when such way or other matter shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and where such way or other matter shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing(x).

And it is enacted, that when the access and use of light to and for any dwelling-house, workshop or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing (y).

And that each of the respective periods of years herein-before mentioned shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate (\*)shall have been or shall be brought into question, and that no act or other matter shall be deemed to be an interruption, within the meaning of the statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorizing the same to be made(z).

<sup>(</sup>x) Sec. 2. (y) Sec. 3. (z) Sec. 4. (\*414)

And after directing the mode of pleading(a), it provides that no presumption shall be allowed or made in favor or support of any claim, upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time or number of years than for such period or number mentioned in the Act as may be applicable to the case and to the nature of the claim(b).

But it is provided, that the time during which any person otherwise capable of resisting any claim to any of the matters before mentioned shall have been or shall be an infant, idiot, non compos mentis, feme covert, or tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted, until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods herein-before mentioned, except only in cases where the right or claim is hereby declared to be absolute and indefeasible (c).

Provided that when any land or water upon, over or from which any such way or other convenient water-course or use of water shall have been or shall be enjoyed or derived hath been or shall be held under or by virtue of any term of life, or any term of years exceeding three years from the granting thereof, the time of the enjoyment of any such way or other matter as herein last (\*)before mentioned, during the continuance of such term, shall be excluded in the computation of the said period of forty years, in case the claim shall within three years next after the end or sooner determination of such term be resisted by any person entitled to any reversion expectant on the determination thereof(d).

And by the 2 & 3 Wil. 4, c. 100, "for shortening the

<sup>(</sup>a) Sec. 5.

<sup>(</sup>c) Sec. 7.

<sup>(</sup>b) Sec. 6.

<sup>(</sup>d) Sec. 8.

time required in claims of modus decimandi, or exemption from or discharge of tithes"(I), it is enacted that all prescriptions for any modus decimandi, or to any exemption from tithes, by composition real or otherwise, shall, in cases where the render of tithes in kind shall be demanded by the King, or by any duke of Cornwall, or by any lay person, not being a corporation sole, or by any body corporate, whether temporal or spiritual, be deemed good in law, upon evidence showing, in cases of claim of a modus the render of such modus, and in cases of claim to exemption showing the enjoyment of the land, without render of tithes, money, or other matter in lieu thereof, for thirty years next before the time of such demand, unless, in the case of claim of a modus, the actual render of tithes, or of money or other thing differing from the modus claimed, or, in case of claim to exemption, the render of tithes, or of money or other matter in lieu thereof, shall be shown to have taken place at some time prior to such thirty years, or it shall be proved that such payment or render of modus was made or enjoyment had by some consent or agreement expressly made or given by deed or writing; and if such proof in (\*) support of the claim shall be extended to the full period of sixty years next before the time of such demand, the claim shall be deemed indefeasible, unless it shall be proved that such payment or render of modus was made or enjoyment had by some consent or agreement expressly made or given for that purpose by deed or writing.

And where the render of tithes in kind shall be demanded by any archbishop, or other corporation sole, whether spiritual or temporal, every such prescription

<sup>(</sup>I) It does not extend to Ireland (sec. 9.); nor to suits commenced at a day now past (sec. 3.); and there is a further exception as to tithes then let or compounded for.—See sec. 4.

<sup>(\*416)</sup> 

shall be indefeasible, upon evidence showing such render of modus made or enjoyment had, as before mentioned applicable to the nature of the claim, during the time that two persons in succession shall have held the office or benefice in respect whereof such render of tithes shall be claimed, and for not less than three years after the appointment and institution or induction of a third person thereto: provided always, that if the whole time of the holding of such two persons shall be less than sixty years, then it shall be necessary to show such render of modus made or enjoyment had, not only during the whole of such time, but also during such further number of years either before or after such time, or partly before and partly after, as shall with such time be sufficient to make up the period of sixty years, and also during the further period of three years after the appointment and institution or induction of a third person to the same office or benefice, unless it shall be proved that such payment or render of modus was made or enjoyment had by some consent or agreement expressly made or given for that purpose by deed or writing(e).

And it is enacted, that every composition for tithes which hath been made or confirmed by the decree of any (\*)court of equity in England in a suit to which the ordinary, patron and incumbent were parties, and which hath not since been set aside, abandoned or departed from, shall be valid in law; and that no modus or exemption shall be deemed to be within the provisions of the Act, unless the same shall be proved to have existed and been acted upon at the time of or within one year next before the passing of the said Act(f).

But it is provided, that where any lands or tenements shall have been or shall be held by any person entitled

to the tithes thereof, or by any lessee of any such person, or by any person compounding for tithes, or by any tenant whereby the right to the tithes of such lands or tenements may have been or may be during any time in the occupier thereof, or in the person entitled to the rent thereof, the whole of such time shall be excluded in the computation of the several periods of time therein-before mentioned (g).

And it is also provided, that the time during which any person otherwise capable of resisting any claim shall have been or shall be an infant, idiot, non compos mentis, feme covert, or lay tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted, until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods herein-before mentioned, except only in cases where the right or claim is thereby declared to be absolute and indefeasible(h). And after providing for the manner in which in actions and suits the modus or exemption may be alleged(i), it is enacted, that no presumption shall be allowed or (\*)made in favor or support of any claim upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time or number of years than for such period or number mentioned in the Act as may be applicable to the case and to the nature of the  $\operatorname{claim}(k)(I)$ .

(g) Sec. 5.

(h) Sec. 6.

(i) Sec. 7.

(k) Sec. 8.

<sup>(</sup>I) For the new limitation upon actions of debt for rent, or upon any bond, &c. see 3 & 4 W. 4, c. 42, s. 3, 4, 5 & 7, which last section, it should be remembered, applies generally to the 21 Jac. 1.

<sup>(\*418)</sup> 

# (\*)CHAPTER VIII.

OF THE TIME ALLOWED TO COMPLETE THE CONTRACT.

In sales by private agreement it is usual to fix a time for completing the contract. In such a contract the word month may be construed either lunar or calendar, according to the intention of the parties, to be collected from the whole instrument taken together (a). The time fixed is, at law, deemed of the essence of the contract (b)(232); for it is the duty of the seller to be ready to verify the abstract on the day on which it was agreed that the purchase should be completed; and if he have not the title deeds in his possession, or the abstract set forth a defective title, the purchaser may resist the completion of the contract, and recover his deposit.

In a late case, however(c), upon a sale by auction, the conditions stipulated that the abstract should be delivered to the purchaser within a fortnight, and should be returned at the end of two months; that a draft of the conveyance should be delivered to the purchaser within three months, and be returned to the seller within four months; and that the remainder of the purchase-money

- (a) Lang v. Gale, 1 Mau. & Selw. 111.
- (b) Berry v. Young, 2 Esp. Ca. 640, n.
- (c) Lang v. Gale, 1 Mau. & Selw. 111.

<sup>(232)</sup> So, in equity, time may be of the essence of a contract. Benedict v. Lynch, 1 Johns. Ch. Rep. 370. Though mere lapse of time is not, in all cases, an objection to decreeing a specific performance. Waters v. Travis, on appeal, 9 Johns. Rep. 450. See Thompson v. Ketcham, 8 Johns. Rep. 146. 2d edit.

should be paid on the 24th day of June then next (which was five months after the sale), when the purchaser should receive his conveyance duly executed by all parties; to be prepared by the seller's attorney, at the expense of the purchaser. It was contended that the stipulation in (\*)regard to the delivery of the conveyance was not a condition precedent, and it was compared to the case of Hall v. Cazenove(d), where a charter-party contained a covenant by the owner, that the ship should sail on a specified day, and the owner afterwards brought an action of covenant for the freight; it was held that he need not aver that the ship sailed on that day, although the defendant (the freighter) covenanted to pay the freight in consideration of every thing above mentioned. It was not necessary to decide the point; but Le Blanc, J. said, that it was clear that it was a condition precedent that a draft of the conveyance should be delivered to the purchaser; the question was, whether it must be done by a particular day. It was not necessary, however, to enter upon that question; if it were, it might perhaps be material to advert to the rule, that where a condition does not go to the whole consideration(e) of the contract, but to a part only, it is not a condition precedent. Bayley, J. was of the same opinion. It was not a condition precedent that the draft should be delivered by a particular day, for he did not consider the precise time of the delivery as an essential ingredient in that condition which was meant only to secure a delivery within a reasonable time.

The general opinion has always been, that the day fixed was imperative on the parties at law. This was so laid down by Lord Kenyon, and has never been doubted in practice. The contrary rule would lead to endless

<sup>(</sup>d) 4 East, 477.

<sup>(</sup>e) See Havelock v. Geddes, 10 East, 564.

<sup>(\*420)</sup> 

difficulties. In the above case, for example, the different times appointed, 1. for delivery of the abstract; 2. for the return of it; 3. for the delivery of the conveyance; 4. for the return of it; and 5. for the completion of the purchase, were all links of the same chain, and if one (\*)link were broken, the whole chain would be destroyed. If the time appointed for the delivery of the conveyance was not an essential ingredient, but was meant only to secure a delivery within a reasonable time, it follows that the same rule must apply to the time fixed for the return of it, and also to the time appointed for the completion of the purchase. The effect of this rule would be, that the appointment of a day would have no effect, and in every case it must be referred to a jury to consider whether the act was done within a reasonable time. The precise contract of the parties would be avoided, in order to introduce an uncertain rule, which would lead to endless litigation. This cannot be compared to a case like Hall v. Cazenove: there the ship did sail without being countermanded, and the substance of the covenant was considered to be, that the ship should go to the place named on freight and return again, and if the freighter sustained any damage by reason of the ship not having sailed on the particular day, he might recover it by bringing an action on the covenant. In favor of justice the covenants were not considered as dependent on each other. It would be monstrous that the ship should be permitted to sail to the place named, and return again, and yet not earn any freight, because it did not sail on the day appointed. So where covenants go only to a part of the consideration, and a breach may be paid for in damages, the defendant has a remedy on the covenant, and shall not plead it as a condition precedent. If A. covenant with B. to build a house for him according to a certain plan, and B. covenant with A. to pay for the house so (\*421)

built, it is clear, notwithstanding some authorities to the contrary, that if A, build a house, although not strictly according to the plan, yet B, must pay for it, and may recover in a distinct action against the builder for any (\*)damage sustained by the departure from the plan. The justice of this is evident. But in the case under consideration, the agreements go to the whole consideration on both sides; they are mutual conditions; the one precedent to the other (f). If the draft of the conveyance, for instance, is not delivered on the day appointed, the party who ought to deliver it has broken his agreement, and cannot therefore recover upon it at law. This works no injustice; for the further execution of the contract is at once stopped; the seller retains his estate, and the purchaser his purchase-money, and the party making default is liable, as he ought to be, to an action for breach of his engagement. It is to be hoped, therefore, that the day appointed will always be deemed of the essence of the contract at law. It has so been held in a recent case in the Common Pleas(g). And in a later case upon a sale of goods, where fourteen days were allowed from the day of sale to the purchaser to clear away the goods, the seller was not prepared to deliver them the day after the sale to the purchaser, who applied for them; and it was held, that he (the seller) had broken his agreement, and could not recover against the purchaser, who refused to perform the contract(h). Where the purchaser by a covenant in the contract, was to pay a furthur sum of money, provided the adjoining houses should be completed, that is, paved in front, &c. before a day named, and the pavement was not completed until after the day ap-

<sup>(</sup>f) Boone v. Eyre, 1 H. Blackst. 273. See 10 East, 564.

<sup>(</sup>g) Wilde v. Forte, 4 Taunt. 334.

<sup>(</sup>h) Hagedon v. Laing, 1 Marsh. 514; and see Cornish v. Rowley, post.

<sup>(\*422)</sup> 

pointed, although the delay was occasioned by the bad weather, which prevented the workmen from proceeding, yet the seller was held not entitled to recover the 80l.(i). (\*)But a party may even at law wave the forfeiture, and enlarge the time of his centract(j).

And equity, which from its peculiar jurisdiction is enabled to examine into the cause of delay in completing a purchase, and to ascertain how far the day named was deemed material by the parties, will in certain cases carry the agreement into execution, notwithstanding that the time appointed be elapsed(233); for, as Lord Eldon remarks, the title to an estate requires so much clearing and inquiry, that unless substantial objections appear, not merely as to the time, but an alteration of circumstances affecting the value of the thing; or objections arising out of circumstances, not merely as to the time, but the conduct of the parties during the time; unless the objection can be so sustained, many of the cases go the length of establishing, that the objections cannot be maintained(k)(234). Perhaps there is cause to regret that even equity assumed this power of dispensing with the literal performance of contracts in cases like these.

Objections on account of delay seem divisible into two kinds. The one where the delay is attributable to the neglect of either party; the other where the delay is

<sup>(</sup>i) Maryon v. Carter, 4 Carr. & Pay. 295.

<sup>(</sup>j) Carpenter v. Blandford, 8 Barn. & Cress. 575.

<sup>(</sup>k) Per, Lord Eldon, see 7 Ves. jun. 274; and see Hearne v. Tenant, 13 Ves. jun. 287. See Lennon v. Napper, 2 Scho. & Lef. 683.

<sup>(233)</sup> See Waters v. Travis, on appeal, 9 Johns. Rep. 450.

<sup>(234)</sup> So, if on the other hand, from the lapse of time, circumstances have been so changed, that a specific performance, such as would answer the ends of justice, has become impossible, the objection is decisive. *Pratt* v. *Carroll*, 8 Cranch, 471. *Pratt* v. *Law*, 9 Cranch, 456, 494.

unavoidably occasioned by the state of the title; and of each of these we shall treat in its order.

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### (\*)SECTION I.

Of Delays occasioned by the Neglect of either Party.

The time fixed on for the completion of a contract, had formerly less attention paid to it in equity than is now given to it, which seems to have arisen from the case of Gibson v. Paterson(l), where, according to the report, a specific performance was decreed in favor of the plaintiff, the vendor, without any regard had to his negligence in not producing his title-deeds, &c. within the time limited. And Lord Hardwicke is reported to have said, that most of the cases which were brought into the Court, relating to the execution of articles for the sale of an estate, were of the same kind, and liable to that objection; but that he thought there was nothing in the objection.

It appears, however, that this case is mis-reported; for Lord Rosslyn, in Lloyd v. Collet(m), said he had looked into the case of Gibson v. Paterson, in which the reporter had made Lord Hardwicke treat the time as totally immaterial. He said, it was to be observed, that the circumstances of that case, of which he had taken a copy, did not call for any such opinion. The purchaser, who hung back, had bought an estate in mortgage. The contract

<sup>(</sup>l) 1 Atk. 12.

<sup>(</sup>m) 4 Ves. jun. 690, n; and see 4 Bro. C. C. 497. See Radcliffe v. Warrington, 12 Ves. jun. 326; Alley v. Deschamps, 13 Ves. jun. 225.

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took place in November, and was to be completed in February; in that time, therefore, the mortgage could only be paid off by treaty with the mortgagee. Upon the facts it appeared, that application had been made to the mortgagee, who consented to take his money. Drafts of conveyance were made, and countermanded by the (\*)purchaser. He had, after the contract, demised part of the estate to the vendor at a rent; and, upon application being made to him, every thing being ready, he said he would be off the bargain; he had no money to pay for it; and if they attempted to force him, he would go to Scotland to avoid it. Lord Rosslyn added, there could not be the smallest argument upon it, nor the least doubt about the decree.

But whatever opinion Lord Hardwicke entertained on this subject (n), it is now settled, that a man cannot call upon a court of equity for a specific performance, unless he has shown himself ready, desirous, prompt and eager; and therefore time alone is a sufficient bar to the aid of the Court (235).

Thus in a case(o) where the parties differed as to the construction of an agreement, and after a delay of seven years one of the parties filed a bill for a specific performance, it was dismissed merely on account of the staleness of the demand.

A bill for a specific performance is an application to the discretion, or rather to the extraordinary jurisdiction

<sup>(</sup>n) See 1 Ves. 450.

<sup>(</sup>o) Milward v. Earl of Thanet, 5 Ves. jun. 720, n. (b). See Alley v. Deschamps, 13 Ves. jun. 225.

<sup>(235)</sup> See Pratt v. Carroll, 8 Cranch, 471. Pratt v. Law, 9 Cranch, 456, 494. Somerville v. Trueman, 4 Har. & M'Hen. 43. Benedict v. Lynch, 1 Johns. Ch. Rep. 370. In equity, time may be dispensed with, if it be not of the essence of the contract. Hepburn v. Auld, 5 Cranch, 262.

of equity, which cannot be exercised in favor of persons who have long slept upon their rights, and acquiesced in a title and possession adverse to their claim. Due diligence is necessary to call the Court into activity, and where it does not exist, a court of equity will not lend its assistance; it always discountenances laches and neglect(p)(236).

If the vendor be not ready with his abstract and titledeeds at the day fixed, the purchaser may avoid the

agreement at law.

(\*)Thus, in a case(q) where upon a sale it was agreed that a good title should be made out by the 10th of July; in the beginning of July the purchaser called on the vendor to show him the title-deeds; but he not having them in his possession, gave the purchaser an abstract of the title, which did not contain any of the deeds; and although it was suggested that an application ought to have been made to the vendor at an earlier period, yet Lord Kenyon ruled otherwise, as the seller, he said, ought to be prepared to produce his title-deeds at the particular day.

This rule does not, however, prevail in equity; for it is there considered equally incumbent on the purchaser to ask for the abstract, as for the vendor to deliver it. And, therefore, if a purchaser do not call for the abstract before the time agreed upon for its delivery(r), or do not ask for it until it has become impossible to execute the

(p) Per Lord Manners, 1 Ball & Beatty, 68.

(r) Guest v. Homfrey, 5 Ves. jun. 818.

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<sup>(</sup>q) Berry v. Young, 2 Esp. Ca. 640, n.; vide supra, p. 419.

<sup>(236)</sup> See Benedict v. Lynch, 1 Johns. Ch. Rep. 370, 375. Hatch v. Cobb, 4 Johns. Ch. Rep. 559. Kempshall v. Stone, 5 Johns. Ch. Rep. 194. Higginbotham v. Burnet, 5 Johns. Ch. Rep. 184. Pratt v. Carrott, 8 Cranch, 471. Pratt v. Law, 9 Cranch, 456, 494. Colcock v. Butler, 1 Des. 307. Butler v. O'Hear, 1 Des. 382, 398.

agreement by the day fixed(s), equity will consider the time as waved.

So, if the purchaser receive the abstract after the day appointed, and do not at the time object to the delay, he cannot afterwards insist upon it as a bar to a performance in specie(t).

It is, however, clearly settled, that a specific performance shall not be enforced, where no steps have been taken by the vendor, although in proper time urged by the purchaser to do so, and the purchaser, immediately when the time is clapsed, insists upon his deposit, and refuses to perform the agreement.

This was decided in Lloyd v. Collett(u); the case was, (\*)that on the 10th August 1792, the defendant contracted for the purchase of the estate, the purchase to be completed on or before the 25th of March 1793, and had frequently between those times applied for an abstract of the title, but could not obtain one. Shortly after the 25th of March 1793, the purchaser applied for his deposit, with interest from the 10th of August 1792, when he paid it: and afterwards repeatedly applied for it before the 10th of June 1793, when he brought an action for the deposit. On the 16th September 1793, an abstract was delivered; the purchaser was then out of town, and on his return, on the 25th of October, wrote, insisting that he would not complete his purchase. On the 6th of November the bill was filed by the vendor for a specific performance, and for an injunction to restrain the proceedings at law. Lord Rosslyn said, the conduct of parties, inevitable

<sup>(</sup>s) Jones v. Price, 3 Anstr. 924.

<sup>(</sup>t) Smith v. Burnam, 2 Anstr. 527; and see Seton v. Slade, 7 Ves. jun. 265.

<sup>(</sup>u) 4 Bro. C. C. 469; 4 Ves. jun. 689. See 5 Ves. 737; 7 Ves. jun. 278; and see Pincke v. Curteis, stated infra; Potts v. Webb, 4 Bro. C. C. 330, cited; Paine v. Meller, 6 Ves. jun. 349; and Warde v. Jeffery, 4 Price, 294.

accident, &c. might induce the Court to relieve; but it was a different thing to say, that the appointment of a day was to have no effect at all, and that it was not in the power of the parties to contract, that if the agreement was not executed at a particular time, the parties should be at liberty to rescind it. And he therefore considered the contract as at an end.

But where a vendor has proceeded to make out his title, and has not been guilty of gross negligence, equity will assist him, although the title was not deduced at the time appointed (237).

Thus, in Fordyce v. Ford(x), the purchase was to be completed on the 30th July 1793. The abstract was not delivered until the 8th, and the treaty continued until the 25th of September, on which day the deeds were delivered, (\*) and every difficulty cleared up; when the purchaser refused to proceed, alleging that he wanted the estate for a residence for the last summer, and insisting he was not bound to go on, on account of the delay. The Master of the Rolls said, the rule certainly was, that where in a contract either party had been guilty of gross negligence, the Court would not lend its assistance to the completion of the contract; but in this case he thought there had been no such negligence, and decreed accordingly; adding, that he hoped it would not be gathered from thence, that a man was to enter into a contract, and think he was to have his own time to make out his title.

The rules on this subject apply, as they ought to do, to each party. And therefore, where a purchaser permits a long time to elapse, without evincing a fixed marked intention to carry his contract into execution, he will be

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<sup>(</sup>x) 4 Bro. C. C. 494; Radcliffe v. Warrington, 13 Ves. jun. 323.

<sup>(237)</sup> As to the extension of time for completing the title, see Hepburn v. Dunlop, 1 Wheat. 179, 196. Hepburn v. Auld, 5 Cranch, 262. See also, Ramsay v. Brailsford, 2 Des. 583.

left to his remedy at law, although he may have paid part of the purchase-money. He is not to be suffered to lie by, and speculate on the estate rising in value(y). Nor will he be assisted by equity, where he has made frivolous objections to the title, and trifled, or shown a backwardness to perform his part of the agreement, especially if circumstances are altered(z). And where the price is unreasonable or inadequate, or the contract is in other respects inequitable, equity will not assist either party, if he has permitted the day appointed for completing the contract to elapse without performing his part of the agreement(a).

(\*) The time, however, is more particularly attended to in sales of reversion: for it is of the essence of justice that such contracts should be executed immediately, and without delay. No man sells a reversion who is not distressed for money; and it is ridiculous to talk of making him a compensation by giving him interest on the purchase-money during the delay(b).

So time is very material where the estate is sold in order to pay off any incumbrance bearing a higher rate of interest than the vendor is entitled to receive, in respect of the purchase-money, during the delay(c); or the estate is sold for the purposes of a trade or manufacto-

<sup>(</sup>y) Harrington v. Wheeler, 4 Ves. jun. 636; Alley v. Deschamps, 13 Ves. jun. 225.

<sup>(</sup>z) Hayes v. Caryll, 1 Bro. P. C. 27; 5 Vin. Abr. 538, pl. 18; Spurrier v. Hancock, 4 Ves. jun. 667; Pope v. Simpson, 5 Ves. jun. 145; and Coward v. Odingsale, 2 Eq. Ca. Abr. 688, pl. 5; and see Green v. Wood, 2 Vern. 632; Bell v. Howard, 9 Mod. 302; and Main v. Melbourn, 4 Ves. jun. 720.

<sup>(</sup>a) Vide ante, ch. 5; and Whorwood v. Simpson, 2 Vern. 186; Lewis v. Lord Lechmere, 10 Mod. 503.

<sup>(</sup>b) Newman v. Rodgers, 4 Bro. C. C. 391; and see Spurrier v. Hancock, 4 Ves. jun. 667.

<sup>(</sup>c) Popham v. Eyre, Lofft, 786; and see a case cited in 2 Scho. & Lef. 604.

 $\operatorname{ry}(d)$ ; or the subject of the contract is in its nature of a fluctuating value(e).

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#### SECTION II.

Of Delays occasioned by the State of the Title.

It may be laid down as a general proposition, that a delay accounted for on the above ground will not prevent a specific performance being decreed, where the time fixed for completing the contract is not material. Thus, if an estate was described as in good repair, and it turned out to be in bad repair, and several months may be required to repair it, yet the purchaser cannot resist the contract on the ground of time, unless it could be clearly shown, that he wanted possession of the house to live in at a given period, by which time the repairs could not be (\*)completed(f). So if the estate is in lease, and it was stated that the purchaser would be entitled to possession several months before the lease actually expire, yet he cannot rescind the agreement, unless the personal occupation of the estate was essential to him at the time appointed(g).

Where time is not material, and the title is bad, but the defect can be cured, if the vendee is unwilling to stay,

<sup>(</sup>d) Parker v. Frith, 1 Sim. & Stu. 199; Wright v. Howard, ib. 190; Coslake v. Tilt, 1 Russ. 376.

<sup>(</sup>e) Doloret v. Rothschild, 1 Sim. & Stu. 590.

<sup>(</sup>f) See Dyer v. Hargrave, 10 Ves. jun. 505, supra, p. 290.

<sup>(</sup>g) Hall v. Smith, Rolls, 18 Dec. 1807, MS.; S. C. 14 Ves. jun. 426; and see 13 Ves. jun. 77.

<sup>(\*430)</sup> 

the vendor should file a bill in equity to enforce the performance of the contract(h); for it is sufficient if the party entering into articles to sell has a good title at the time of the decree; the direction of the Court being, in all these cases, to inquire whether the seller can, not whether he could, make a title at the time of executing the agreement (238).

This principle was followed in a case of frequent reference(i). And in a late case(k), the vendor, at the time he filed the bill for a specific performance, had only a term of years in the estate, of which he had articled to sell the fee-simple, and after the bill was filed, procured the fee by means of an act of parliament; and as the day on which the contract was to be carried into execution was not material, a specific performance was decreed.

The same rule prevails at law, where no time is fixed for completing the contract, and an application for the title has not been made by the purchaser previously to an action by the vendor for breach of contract. For in Thompson v. Miles(l), a man agreed to sell a term of (\*)which he stated forty years to be unexpired. It appeared there were only thirty-nine, but by an agreement indorsed on the lease, the lessor agreed to add one year to the unexpired term. This agreement was dated after an action brought by the vendor for damages on breach of agreement; and Lord Kenyon ruled, that the vendor having at that time a good title was sufficient. His

<sup>(</sup>h) See 6 Ves jun. 655; 10 Ves. jun. 315.

<sup>(</sup>i) Langford v. Pitt, 2 P. Wms. 629; and see Jenkins v. Hiles, 6 Ves. jun. 646; Seton v. Slade, 7 Ves. jun. 265.

<sup>(</sup>k) Wynn v. Morgan, 7 Ves. jun. 202.

<sup>(1) 1</sup> Esp. Ca. 184; see Willett v. Clarke, 10 Price, 207.

<sup>(238)</sup> See Hepburn v. Auld, 5 Cranch, 262. See also Hepburn v. Dunlop, 1 Wheat. 179, 195. Clute v. Robison, on appeal, 2 Johns. Rep. 595.

Lordship said, that it had been solemnly adjudged, that if a party sells an estate without having title, but before he is called upon to make a conveyance, by a private act of parliament gets such an estate as will enable him to make a title, that is sufficient: that here the plaintiff being enabled to make a title, and the defendant never having applied for it, he should not be allowed to set up against the plaintiff a want of title, though the power of making that title was obtained after the action was brought.

But if the vendor cannot verify his abstract at the time appointed, or if he produce a defective title, and the purchaser bring an action for recovery of the deposit, the vendor having a title at the time of the trial will not avail him. Thus, in Cornish v. Rowley(m), where a purchaser sought to recover his deposit, it appeared that the abstract of the title began in the year 1793, and after reciting that the deeds relating to the estate had been lost, stated a fine and non-claim. Upon inquiry, it was found that the fact of the deeds having been lost was not true. The counsel for the defendant said they were ready to make out a good title. Lord Kenyon said, that the vendor must be prepared to make out a good title on the day when the purchase is to be completed. Indulgence, he was aware, was often given for the purpose of procuring probates of wills, &c. But this indulgence was voluntary on the part of the intended purchaser. It is the duty of (\*)the seller to be ready to verify his abstract at the day on which it was agreed that the purchase should be completed. If the seller deliver an abstract, setting forth a defective title, the plaintiff may object to it. No man was ever induced to take a title like the present. A fine and non-claim are good splices to another title, but they will not do alone. There are many exceptions in the statute in favor of infants, femes covert, &c. As a good title was

<sup>(</sup>m) B. R. Midd. Sitt. after M. T. 40 Geo. III.; 1 Selw. N. P. 160. (\*432)

not made out at the day fixed, he should direct the jury to find a verdict for the deposit, with interest up to that day. And a verdict was found by the jury accordingly.

So, in Bartlett r. Tuchin(n), assignees of a bankrupt sold an estate, and no time was fixed for completing the purchase. The purchaser upon a supposed defect of title abandoned the contract; afterwards the commission was superseded, and a new one issued, under which the same assignees were chosen. It was held that the purchaser might rescind the contract, for at the time he gave notice of his abandonment of the contract, the assignees could not make out a good title. And in a late case(o), the facts were, that upon a sale it was agreed that the purchase-money should be paid on or before Lady-day 1803, on having a good title. The vendors were assignees of a bankrupt who claimed under a will. They thought that he had an estate-tail under the will, and that therefore they could make a title; but under the devise he only took for life, with contingent remainders over. The bankrupt, however, being heir at law of the testator, could make a title by levying a fine, and was willing to join; but these facts were not stated in the abstract delivered, or communicated to the purchaser until a fortnight before (\*)the assizes. The Court, after showing that the bankrupt took only an estate for life under the devise to him, said, as it was stated, that previous to the time fixed for payment of the money, and completion of the purchase, or indeed till near the time of trial, no information was given to the purchaser that the bankrupt was heir at law of the testator, but the title of the assignees appeared to have

<sup>(</sup>n) 1 Marsh. 583. See Goodwin v. Lightbody, 1 Dan. 153; Roper v. Coombes, 6 Barn. & Ald. 584.

<sup>. (</sup>o) Seward v. Willock, 5 East, 198; 1 Smith's Rep. 390, S. C.; and see Radcliffe v. Warrington, 12 Ves. jun. 326, where the purchaser recovered at law.

been delivered in, on the supposition of the bankrupt being tenant in tail, they thought that the defendant had failed in making good the agreement on his part; and that thereupon a right of action at law had accrued to the plaintiff. How far the title since communicated might in another course of proceeding in another place, render the present proceeding abortive; and whether the plaintiff might not be ultimately compelled to fulfil his agreement, was not for them in that action to decide.

In an early case(p) the Court of Chancery carried this doctrine very far; for at the time of the articles for sale, or even when the decree was pronounced, Lord Stourton, the vendor, could not make a title, the reversion in fee being in the Crown; and yet the Court indulged him with time more than once for the getting in the title from the Crown, which could not be effected without an act of parliament, to be obtained in the following session: however, it was at length procured, and Sir Thomas Meers decreed to be the purchaser(I); and even at this day, although the Master report against the title, yet if it appear that the seller will have a title upon getting in a term, (\*) or procuring letters of administration, &c. the Court will not release the purchaser; but will put the vendor under terms to complete his title speedily (pp). Or if a new fact appear which enables him to make a title when the cause is before the Court on further directions, the contract will be enforced(q), but the Court will not extend the rule

<sup>(</sup>p) Lord Stourton v. Sir Thomas Meers, stated in 2 P. Wms. 631; and see Sheffield v. Lord Mulgrave, 2 Ves. jun. 526; Ormerod v. Hardman, 5 Ves. jun. 722.

<sup>(</sup>pp) Coffin v. Cooper, 14 Ves. jun. 205.

<sup>(</sup>q) Esdaile v. Stephenson, 8 Aug. 1822, MS. supra, p. 219.

<sup>(</sup>I) Note, it appears that Sir Thomas Meers was mortgagee of the estate; (see Sir Thomas Meers v. Lord Stourton, 1 P. Wms. 46,) and it is therefore probable that at the time he entered into the contract he was aware of the defects in the title.

<sup>(\*434)</sup> 

which it has adopted of compelling a purchaser to take the estate where a title is not made till after the contract, to any case to which it has not already been applied. Therefore in a case where upon a creditor's bill filed for sale of the real estate of a trader, the usual accounts were decreed and a sale ordered, and the estates were accordingly sold; but it afterwards appeared that the fact of the trading was not regularly proved, and then the cause was re-heard, the decree upon which re-hearing was also open to objection; the purchaser under the decree was upon motion relieved from his purchase, although the parties were willing to take steps to remove the objections(r).

And where a purchaser enters into, or proceeds in a treaty, after he is acquainted with defects in the title, and knows that the vendor's ability to make a good title depends on the defects being cured, he will be held to his bargain, although the time appointed for completing the contract is expired and considerable further time may be required to make a good title.

Thus in a case(s), where it was agreed upon a purchase, that it should be completed on the 5th April 1792, (\*)it appeared that the purchaser had applied for an abstract at the latter end of January, or the beginning of February, which not being sent to him, he, after the expiration of the time for the completion of the purchase, applied for his deposit, saying, that he should not proceed in his purchase. About the 21st of April, an abstract was sent him, and it appeared that a suit in Chancery

 <sup>(</sup>r) Lechmere v. Brasier, 2 Jac. & Walk. 287; Dalby v. Pullen,
 3 Sim. 29; 1 Russ. & Myl. 296; Coster v. Turnor, 1 Russ. & Myl.
 311.

<sup>(</sup>s) Pincke v. Curteis, 4 Bro. C. C. 329; and see Smith v. Burnam, 2 Anstr. 527; and Paine v. Meller, 6 Ves. jun. 349; Warde v. Jeffery, 4 Price, 295; see Smith v. Sir Thomas Dolman, 6 Bro. P. C. 291, by Tomlins.

must be determined before a title could be made, upon which he again declared he would not proceed in the purchase, and again required his deposit. In Trinity term he brought an action for his deposit, and, on the 6th of November, the bill was filed. The purchaser, by his answer, stated that the suit was still depending, and that questions of law had arisen, which then stood for argument in the Court of King's Bench.

The Lords Commissioners Ashhurst and Wilson granted an injunction, which was continued by Lord Rosslyn, who said, in these contracts (sales by auction) in general, the time of completing the contract is specified, and a deposit is paid; and if the title is not made out by the time, the vendee is entitled to take back his deposit. But in this case the vendee was apprised of the title depending on the ability of the vendors to make a good title, which itself depended on the event of a Chancery suit, and was, notwithstanding, willing to go on with his purchase; there had been a communication of the delay of the suit, and the present bill was filed after great delay(I). If the vendee had called for his deposit at the end of the time limited for completing the purchase, and insisted he would not go on with his purchase, the Court would not have compelled him. The cause was afterwards heard before (\*)the Master of the Rolls, who was also of opinion, that there had been a sufficient communication of the real state of the delay, and that the purchaser had acquiesced in it, or at least not sufficiently declared his dissent to go on with the purchase; and therefore it was referred to the Master to inquire as to the title.

So in Seton v. Slade(t), it appeared that the purchaser

<sup>(1) 7</sup> Ves. jun. 265. See Wood r. Bernal, 19 Ves. 220.

<sup>(</sup>I) The judgment shows the true ground of the decree; but according to the state of facts in the report, the case was similar to that of Lloyd v. Collet, stated, supra, p. 424.

<sup>(\*436)</sup> 

was aware of the objections to the title at the time he purchased the estate, and afterwards accepted the abstract within a few days of the time appointed for completing the contract. He had, however, previously declared, that if the title was not made out by the time, he would relinquish the contract; and the day after the time appointed he actually applied for his deposit, alleging that the abstract, so far from showing a right in the vendor to convey, stated merely a contract for the purchase by him, without noticing a suit in Chancery. But the purchaser having been aware of the objections to the title, and having afterwards received the abstract, a specific performance was decreed.

Again(u), where personal representatives of a trustee supposing erroneously they had power to sell, entered into a contract for sale, and when the mistake was discovered, the purchaser was apprised that the sellers would take the necessary steps to make a title, which they did, but before they were completed, the purchaser brought an action for his deposit, which he recovered, and then the others filed a bill for a specific performance; it was held that the purchaser, if he had thought fit, might have declined the contract as soon as he discovered that the plaintiffs had no title, and he was not bound to wait until they had acquired a title; but he not having taken that (\*)course, it was enough that at the hearing a good title could be made.

Although a treaty may have lain dormant for some time, yet if the contract is not abandoned, a performance will be decreed in specie.

Thus in a case (x) where, upon objections to a title, the treaty had proceeded for about two years, when the ven-

<sup>(</sup>u) Hoggart v. Scott, 1 Russ. & Myl. 293.

<sup>(</sup>x) Marquis of Hertford v. Boore, 5 Ves. jun. 719. See Milward v. Earl of Thanet, 5 Ves. jun. 720, n. (b).

dor's solicitor wrote, calling for a distinct answer, saying, that otherwise he must be under the necessity of filing a bill. No answer was returned to the letter, nor was any notice given that the purchaser considered the contract as abandoned; neither had he brought any action for the deposit. The bill was filed after a delay of about fourteen months, and the defendant resisted a specific performance on the ground of delay, by which, he stated, he had suffered material inconvenience, having purchased the place as his residence, and that he was induced to consider the contract as abandoned. A specific performance was however decreed.

But if a purchaser object to the title, and declare he will not complete the contract, and the vendor acquiesce in this declaration, he cannot afterwards clear up the objections to his title, and compel the purchaser to perform the agreement. This was decided in the case of Guest v. Homfray(y). The purchaser took objections to the title, and was informed that no better title could be made; whereupon he said, he would not proceed in the purchase, and afterwards returned the abstract, at the desire of the vendor, at the same time acquainting him (the vendor) that he (the purchaser) still considered the contract was at an end. In about eight months after this the abstract was returned, with the objections answered, (\*) and the bill was filed upon the defendant refusing to complete the contract. But the bill was dismissed, although it was clear that the purchaser had almost all the time wished to be off the bargain. Lord Alvanley, then Master of the Rolls, said, they should have cautioned the purchaser, and told him they were going on to make out a title. If they had done all that, and shown a probable ground to the purchaser that they might make a good

<sup>(</sup>y) 5 Ves. jun. 818. (\*438)

title, Lord Alvanley said, he should perhaps not have thought a year too long.

In Watson v. Reid(z), the contract was in June 1826. An abstract was delivered, and a correspondence took place with respect to the title. On the 7th April 1827 the purchaser gave notice that he objected to the title, and abandoned the contract; and on the 1st May he demanded a return of the deposit. The seller refused to return it; and on the 25th April 1828 filed a bill for a specific performance, and the Master of the Rolls dismissed it with costs, upon the ground of unreasonable delay in filing it.

Where circumstances are such that the purchase-money cannot be paid for a length of time, as if the purchaser die, or become bankrupt before the contract be carried into effect, and his executors, or assignees, are not able to get in the assets or effects, the vendor is entitled to require the contract to be rescinded, and he will be allowed his costs(a); or he may demand a specific performance; and if the defendants are unable or unwilling to perform the contract, that the estates may be resold; and if the purchase-money arising by the resale, together with the deposit, shall not amount to the purchase-money, (\*)that the defendant may pay the deficiency.—A bill for the latter purposes was filed by a vendor against the assignees of a bankrupt, and a decree was made for resale. The deficiency upon that resale was 5,016l.; and the cause coming on for further directions, Lord Rosslyn directed that sum to be proved under the commission; saying, the whole purchase-money was the debt, and the vendor had a lien on the estate(b); which proving by

<sup>(</sup>z) 1 Russ. & Myl. 236.

<sup>(</sup>a) Mackreth v. Marlar, 1 Cox, 259; Cox's n.(1) to 2 P. Wms. 67; Whittaker v. Whittaker, 4 Bro. C. C. 31. See Sir James Lowther v. Lady Andover, 1 Bro. C. C. 396; Dickenson v. Heron, infra, ch. 10.

<sup>(</sup>b) Vide supra, ch. 1.

the resale deficient, the residue was to be proved under the commission (c).

In Wright v. Wellesley(d), upon a sale it was agreed that part of the purchase-money should be secured by mortgage. There was a decree for a specific performance, and a conveyance and mortgage were directed to be executed, and further directions were reserved. The Master made his report, by which it appeared that the purchaser had made default in bringing in the proper deeds, and he found what was due, which was regularly demanded, but not paid. The plaintiff, the seller, presented a petition, which came on with the further directions, praying the sale of the property, in consequence of the purchaser's default. It was objected that this could not be done; and that at all events a supplemental bill was necessary; but the Vice-Chancellor made the order as prayed for: as the defendant had evaded the decree of the Court, he would give the relief required by the new state of circumstances, and he thought that the petition was regularly presented.

In a late case, where an estate was sold by auction, in order to pay off incumbrances, under the usual conditions, and the purchase was to be completed on the 25th of March 1805, the estate was sold for 123,000l. and the (\*)purchaser paid only 4,000l. as a deposit, when he ought to have paid 24,000l. A short time previously to Ladyday he wrote a letter to the vendors, acknowledging his inability to pay, and requesting them to join in a resale, offering to pay any loss by the second sale. This they refused; and he not having the money ready, on the 27th of March 1805, filed a bill for a specific performance, evidently to gain time. The vendors filed a crossbill; and afterwards the purchaser became a bankrupt,

<sup>(</sup>c) Bowles v. Rogers, 6 Ves. jun. 95. n.

<sup>(</sup>d) V. C. 26 Feb. 1833. MS.

<sup>(\*440)</sup> 

when the causes were revived. The expenses of the vendors, in payment of the auction-duty, &c. were very considerable. The cross cause came on first; the assignees of course could not bind themselves to pay the money; and the contract was decreed to be delivered up and cancelled, so that the vendors became entitled to the 4,000l. deposit(e).

We are now to consider whether equity will permit the parties to make time the essence of the contract.

In Williams v. Thompson or Bonham(f), the bill was to carry into execution the trusts of a will, and for a specific performance of an agreement by Bonham, to purchase a real estate of the defendants. By the agreement, dated the 9th of July 1778, it was particularly expressed, "that in case a good title to the premises, discharged from all claims and demands whatsoever, should not be made out to the satisfaction of Bonham within three years from the date thereof, the agreement thereby made, so far as concerned the purchase of the premises (for the agreement contained other stipulations), should from thenceforth become void." The defendant was always ready to have completed his purchase, but the trustees (\*)under the will were incapable of making out a title without the aid of equity, and for that purpose the bill in question was filed in February 1781. The cause came to a hearing on the 29th of June 1782, when the defendant (Bonham) insisted, that the title not having been made out at the time mentioned in the agreement, he was discharged from his purchase. But Lord Thurlow was of opinion, that the time fixed by the articles for making a title to the defendant was only formal, and not of the essence of the agreement; and, as appears by the Regis-

<sup>(</sup>e) Steadman v. Lord Galloway, et è contra, Rolls, 9th Feb. 1808.

<sup>(</sup>f) 4 Bro. C. C. 331, cited; Newl. Contr. 238, stated. See the case in Reg. Lib. B. 1781, fol. 564.

trar's book, he declared, that the three years being expired was not a sufficient objection to the agreement being

performed.

This case depends so much on its own complicated circumstances, as scarcely to admit of being cited as an authority which should rule any other case. I find, from the Registrar's book, that it was impossible to make a title without a decree. The agreement, which was very long and special, stated all the facts; and it was expressly stipulated, that the trustees should use their utmost endeavors to obtain a decree, and the purchaser was immediately let into possession. Now the bill was filed before the expiration of the three years, no laches was imputed to the trustees, and it did not appear that the purchaser had sustained any loss, or been put to any inconvenience. It would therefore have been a strong measure to hold, that the time was of the essence of the contract. The purchaser entered into the contract with full knowledge of all the obstacles in the way of making a title; and unless the purchase was completed, there was no mode of indemnifying the trustees for the expense incurred by the Chancery suit.

In the case of Gregson v. Riddle(g), which was also (\*)before Lord Thurlow, the agreement was for a particular day; with a proviso, that in case the title should not be approved in two months, the agreement was to be void and of no effect. There was an outstanding legal estate, which could not be got in by that time. A bill was filed for a specific performance. The defendant resisting, a reference was directed, to see whether a good title could be made; Lord Loughborough, then Lord Commissioner, expressing an opinion that the terms of the agreement were complied with(1). The report was in favor of the

<sup>(</sup>g) 7 Ves. jun. 268, cited.

<sup>(</sup>I) The stipulation was, that in case the title should not be approved (\*442)

title. The cause coming on before Lord Thurlow, the performance was still resisted. Lord Thurlow said, it had been often attempted to get rid of agreements upon this ground, but never with success. The utmost extent was to hold it evidence of a waver of the agreement; but it never was held to make it void. Mr. Mansfield, for the defendant, said, the intention was clearly to make it void; and that it would be necessary to insert a clause, that not-withstanding the decision of the Court of Chancery, it should be void. Lord Thurlow said, such a clause might be inserted; and the parties would be just as forward as they were then.

On this dictum it must be remarked, that the case did not call for it, as the agreement appears to have been substantially performed within the time. And it is said, that in Potts v. Webb, before Lord Thurlow, it being part of the terms that the purchase should be completed by a certain time, his Lordship thought that a good reason for not decreeing a specific performance(h). At the same (\*)time it must be admitted, that Lord Thurlow entertained a floating opinion, that time could not in general be made of the essence of the contract. It does not appear, however, that any case ever came before him in which he was called upon to decide the point, and his opinion has not been followed in subsequent cases.

For in Lloyd v. Collet(i), in which the case of Gregson v. Riddle was cited, Lord Chancellor Loughborough said, the conduct of the parties, inevitable accident, &c. might induce the Court to relieve; but it was a different

<sup>(</sup>h) 4 Bro. C. C. 330, cited.

<sup>(</sup>i) 4 Bro. C. C. 469; 4 Ves. jun. 689; note stated supra.

of by the purchaser's counsel within two months, the articles should be void. The difficulty upon the title arose upon a settlement which the seller insisted was voluntary, and not upon a mere outstanding legal estate. The seller insisted upon being at liberty to rescind the contract, under the clause in the articles.

thing to say the appointment of a day was to have no effect at all, and that it was not in the power of the parties to contract, that if the agreement was not executed at a particular time, the parties should be at liberty to rescind it.

And in the late case of Seton v. Slade(k), Lord Eldon said, he inclined much to think, notwithstanding what was said in Gregson v. Riddle, that time may be made the essence of the contract(239).

The case under consideration has been assimilated to a mortgage, where, although the parties may have expressly stipulated, that if the money be not paid at a particular time, the mortgagor shall be foreclosed, yet equity will permit him to redeem, in the same manner as if no such stipulation had been entered into. There does not appear to be any analogy between the cases. In a mortgage such a declaration is inserted by the mortgagee for his own advantage; but as the land is merely a security for the debt, equity rightly considers that a mortgagee ought only to require his principal and interest, and not to obtain (\*)the estate itself, by taking advantage of the necessities of the mortgagor. Once a mortgage and always a mortgage, has therefore become a maxim; and under this axiom equity is indeed administered; the parties being put in possession of their respective rights without detriment to each other. The same reasoning seems to apply to relief against a penalty. But in an agreement for sale of an estate, where it is expressly declared that the contract shall be void if a title cannot be made by a stated time, the parties themselves have mutually fixed upon a time; the bonu fides of such a transaction seems to be a bar to

<sup>(</sup>k) 7 Ves. jun. 265; and see Lewis v. Lord Lechmere, 10 Mod.
503. See also 3 Ves. jun. 693; 12 Ves. jun. 333; 13 Ves. jun. 289;
2 Mer. 140; Levy v. Lindo, 3 Mer. 81; Ward v. Jeffery, 4 Price, 294.

<sup>(239)</sup> See Benedict v. Lynch, 1 Johns. Ch. Rep. 374.

<sup>(\*444)</sup> 

the interference of a court of equity; and if the contract be vacated by virtue of the agreement, the parties will still be in the possession of their respective rights. We may therefore, perhaps, venture to assert, that if it clearly appear to be the intention of the parties to an agreement, that time shall be deemed of the essence of the contract, it must be so considered in equity(l). In the late case of Hudson v. Bartram(m), the Vice-Chancellor (Sir John Leach) said, that the principle was admitted now that time may be made of the essence of the contract. Why are not parties to insert such a stipulation in their contract? It is difficult to understand how the doubt arose, but it is now at an end; and in the later case of Williams v. Edwards, where it was stipulated by the contract that if the counsel of the purchaser should be of opinion that a marketable title could not be made by the time thereby appointed for the completion of the purchase, the agreement should be void, and delivered up to be cancelled. The counsel of the purchaser was of opinion that the seller was only tenant for life of certain shares of the estate, and a bill filed by the purchaser for a specfic performance, (\*) with a compensation, was dismissed with costs(n).

It remains to observe, that where no time is limited for the performance of the agreement, the cases considered under the first division in this chapter will assist the student in forming a judgment in what instances equity will assist a party who has been guilty of latches, although every case of this nature must in a great measure depend upon its own particular circumstances. The cases classed under the second division apply, however, with greater

<sup>(1)</sup> See Appendix, No. 6.

<sup>(</sup>m) 12 Dec. 1818, MS.; S. C. 3 Madd. 440; and see Boehm v. Wood, 1 Jac. & Walk. 419.

<sup>(</sup>n) Williams v. Edwards, 2 Sim. 78.

force to cases where no time is limited than to those where a day is fixed, for in the former cases, the Court has not to struggle against an express stipulation of the parties.

A case came before the Lords Commissioners in 1792(o), where no time was limited for performing the agreement. The plaintiff was one of two devisees in trust to sell, and pay debts, and had alone sold the estate(I), and entered into articles with the defendant. The co-trustee afterwards refused to join; and there was a mortgagee who refused to be paid off. Neither of these circumstances was disclosed to the purchaser, and upon this delay in the title he proceeded to bring his action against the vendor for a breach of the agreement. The plaintiff brought his bill to compel a specific performance, and to have the co-trustee join; and the mortgage redeemed, and to stay the action. The defendant suffered an injunction to go against him for want of an answer; and having afterwards answered, a motion was made to dissolve the injunction; and the (\*) cause shown by the plaintiff was, the possibility of making a good title by this very suit. The Court held the purchaser bound, and continued the injunction.

In this case it appears from the Registrar's book, that the purchaser insisted on his purchase, and that the injunction should be dissolved; which was certainly a very important feature in the cause. It was not the case of a man merely seeking to recover his deposit. It must, however, be repeated, that it is impossible to lay down any general rule applicable to cases where no time is appointed for performing the agreement. Indeed, throughout this chapter, it has been found impossible to treat the subject of it in an elementary manner.

(o) Tyrer v. Artingstall, Newl. Contr. 236. See the case in Reg. Lib. B. 1792, fo. 28, nom. Tyrer v. Bailey.

<sup>(</sup>I) The estate was sold by auction with the concurrence of the other trustee. The plaintiff, however, alone signed the agreement.

<sup>(\*446)</sup> 

## (\*)CHAPTER IX.

OF THE ABSTRACT AND CONVEYANCE: THE ASSIGNMENTS OF TERMS, ATTESTED COPIES AND COVENANTS FOR TITLE, TO WHICH A PURCHASER IS ENTITLED: OF SEARCHING FOR INCUMBRANCES: AND OF RELIEF IN RESPECT OF INCUMBRANCES.

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#### SECTION I.

Of the Abstract and Conveyance.

The vendor must at his own expense furnish the purchaser with an abstract of his muniments(I), and deduce a clear title to the estate. The abstract ought to mention every incumbrance whatever affecting the estate, and should, therefore, contain an account of every judgment by which it is affected(a); but equity considers it complete whenever it appears, that upon certain acts done, the legal and equitable estates will be in the purchaser; which may be long before the title can be completed(b). Although the estate is sold free from incumbrances, and the abstract shows an amount of incumbrance exceeding

- (a) Richards v. Barton, 1 Esp. Ca. 268.
- (b) See 8 Ves. jun. 436; and 1 Jac. & Walk. 421.

<sup>(</sup>I) Formerly the title-deeds themselves were delivered to the purchaser, and his solicitor prepared the abstract at his expense; and the abstract was compared with the title deeds by the counsel before whom it was laid. See Temple v. Brown, 6 Taunt. 60.

the purchase-money, yet it must be considered that the seller can make a good title(c). This rule is properly (\*)confined to cases where the seller, and persons who are trustees for him, can make a title; for if the concurrence of a stranger is necessary, and he is not bound to join, the abstract cannot be deemed perfect until it shows that he has given perfection to the title(d).

The abstract is delivered for the following purposes: 1st, That the purchaser may see whether the title is such as he will accept. He has also a right to it after he has taken an opinion, in order to take another opinion in case he is not satisfied with that, and for the purpose of taking further objections, and of further considering the title. He must have it too for another purpose, to assist him in preparing his conveyance, that he may see who must be made parties, what form of conveyance is expedient, what parcels are to be inserted, and the like(e). As to the general property in the abstract, it is hard to say who may have it; while the contract is open, it is neither in the vendor nor in the vendee absolutely; but if the sale goes on, it is the property of the vendee; if the sale is broken off, it is the property of the vendor. In the mean time the vendee has a temporary property, and a right to keep it, even if the title be rejected, until the dispute be finally settled, for his own justification, in order to show on what ground he did reject the title (f). If the purchase go off, not only is the abstract to be returned, but no copy to be kept, lest it should be used for a mischievous purpose(g); and although the purchaser pays for the opi-

<sup>(</sup>c) Townsend v. Champernown, 1 You. & Jerv. 449.

<sup>(</sup>d) Lewin v. Guest, 1 Russ. 325.

<sup>(</sup>e) See 2 Taunt. 276, per Mansfield, C. J.

<sup>(</sup>f) 2 Taunt. 278, per Chambre, J.

<sup>(</sup>g) 2 Taunt. 277, per Lawrence, J. (\*448)

nion, yet, for the same reason, that ought, it should seem, to be returned with the abstract(h).

In a case where the purchaser returned the abstract to (\*)the seller, to answer the queries and opinion of counsel, it was held, that he (the purchaser) might maintain trover against the seller for the abstract, although the seller himself might ultimately be entitled to the abstract. The temporary property of the purchaser in the abstract was sufficient to enable him to maintain the action(i).

The seller is bound to produce the deeds, in order that the abstract may be examined with them, although they are not in his possession, and the purchaser is not to be entitled to the custody of them. But, if they are in the possession of a third person, the purchaser's solicitor, it seems, must send to the place where the deeds are, in order to examine them with the abstract, and the seller must pay the expense of the journey(j)(1).

The strict rule seems to be, that the vendor must procure the fee to be vested either in himself, or a trustee for him; and that a purchaser is not compellable to bear the expense of a long conveyance, on account of the legal

- (h) See and consider 2 Taunt. 270, per Mansfield, C. J.
- (i) Roberts v. Wyatt, 2 Taunt. 268.
- (j) Sharp v. Page, Rolls, 1815, MS.

<sup>(</sup>I) Sale by assignees of a bankrupt. A settlement of 1763 was in the possession of a former purchaser, and there was only a covenant to produce a copy of it. A bill was filed by the assignees for a specific performance. The purchaser was informed that the settlement was in the possession of a gentleman in the country, and might be seen there. He was ready to covenant to produce it. The purchaser submitted to the Master that it was the duty of the sellers to produce the deeds stated in the abstract before the Master, or to the purchaser's solicitor in London. The Master stated, that he would make inquiry of conveyancers, what the practice in such cases was, and afterwards decided, that the purchaser's solicitor ought to send to Baldock, where the deeds were, to compare the abstract with the settlement, but that the sellers ought to pay the expenses of such journey.

estate having been outstanding for a length of time, or of the estate being subject to incumbrances which are to be paid off(k). It is not, however, very usual to insist upon (\*)this, unless the title cannot be perfected without a private act of parliament; in which case, the expense of obtaining it is always borne by the vendor.

Unless there be an express stipulation to the contrary, she expense of the conveyance falls on the purchaser(l); who, as we have already seen, must in that case prepare and tender the conveyance(m). The expense attending the execution of the conveyance is, however, always borne by the vendor, but of course he does not pay the costs of the purchaser's attorney.

If the estate be copyhold, the purchaser must bear the expense both of the surrender to him and of his admission(n); and a vendor is not obliged to pay the fine due on the admission of the vendee, although he covenant to surrender and assure the copyholds at his own costs and charges(o); because, it is said, the title is perfected by the admittance, and the fine is not due till after (p).

If a draft be altered by either party, although the alteration be such as would be supported by the Courts, yet the draft as altered should not be ingrossed without a communication being first made to the other party(q).

(k) See 1 H. Blackst. 280.

- (1) See 2 Ves. jun. 155; and note, this is the universal practice of the Profession.
  - (m) Supra, ch. 4.
  - (n) Drury v. Man, 1 Atk. 95, Sanders's edition.

(o) Graham v. Sime, 1 East, 632.

- (p) Dalton v. Hammond, 4 Co. 28 a; Rex v. Lord of the Manor of Hendon, 2 Term Rep. 484; and see Fishe v. Rogers, 1 Rol. Abr. 506, (A.) pl. 1; 3 Burr. 1543; Lex. Cust. p. 163; Wood's Inst. p. 137; Gilb. Ten. 205; 1 Watk. Copy. 286; sed qu. and see Dalton v. Hammond, Cro. Eliz. 779; Mo. 622, pl. 851; and supp. to Co. Copy. s. 10; and Parkins v. Titus, MS.
  - (q) See Staines v. Morris, 1 Ves. & Bea. 15. (\*450)

A purchaser has a right to require the vendor himself to surrender the estate, if copyhold, and to execute the conveyance, if freehold; and he cannot be compelled to accept either a surrender or conveyance, under a power (\*)of attorney, unless an actual necessity appears for it(r); for it tends to multiply his proofs, and he may be put under difficulties by these means; the letter of attorney may be lost, and the party is obliged to prove the execution of it(s). A letter of attorney may be revoked the next moment, that revocation may be notified to the attorney without the purchaser's knowledge, and then the conveyance would be void; and the purchaser's only remedy would be a suit in equity(t). This was said by Lord Hardwicke, but the doctrine of later times is, that a power of attorney given for valuable consideration cannot be revoked(u).

A further objection is, that the vendor may be dead at the time the power is exercised, and in that case the execution would be void, as a power of this nature expires by the death of the principal (w)(241). For this reason, where a purchaser chooses to permit the-conveyance to be executed by attorney, the attorney should execute a declaration of trust, that he will stand possessed of the purchase-money in trust for the purchaser, until it either appear by satisfactory evidence, that the vendor was alive at the time of the execution of the deed, or if he shall be dead, until the estate is duly conveyed to the purchaser.

- (r) Mitchel v. Neale, 2 Ves. 679; Richards v. Barton, 1 Esp. Ca. 268; and see ibid. 115; Noel v. Weston, 6 Madd. 50.
  - (s) See Johnson v. Mason, 1 Esp. Ca. 89.
  - (t) Per Lord Hardwicke, in casu Mitchel v. Neale, ubi sup.
  - (u) Walsh v. Whitcomb, 2 Esp. Ca. 565.
- (w) Shipman v. Thompson, Wynne v. Thomas, Willes, 105, 565; Wallace v. Cooke, 5 Esp. Ca. 117.

<sup>(241)</sup> The grantor of land is presumed to be alive until the contrary is shewn. Battin's Les. v. Bigelow, 1 Peter's Rep. 452.

As a purchaser cannot be required to take a conveyance executed by attorney, so, on the other hand, if a vendor only covenant to surrender or convey lands to a purchaser upon request, he is not compellable to appoint an attorney for that purpose(x).

(\*) Where the estate lies in a register county, the conveyance should be registered as soon as it is executed. Mr. Hilliard remarks(y) that, by the statutes for registry, there is no time limited for registering deeds; and that it is therefore obvious from an inspection of the acts, how necessary it is, that deeds should be registered immediately on their being executed: to enforce this the more strongly, he adds, it may not be useless to consider, if a subsequent conveyance or mortgage should be executed for a valuable consideration, and from an almost momentary inattention or delay of the first vendee or mortgagee, in not immediately registering, the second vendee or mortgagee should register first; whether, in such case, the first vendee or mortgagee doth not thereby become in a worse situation than he would have been by law, in case the registering acts had not been made.

It is clear that, in the case put, the subsequent purchaser or mortgagee, unless he had notice, would prevail over the first vendee or mortgagee. And it must be remarked, that, by delaying to register his conveyance, a purchaser gives a prior incumbrancer, who may have neglected to register his incumbrance, an opportunity of retrieving his error, and thereby establishing his demand on the estate; for the acts only say that deeds shall be void, unless such memorial thereof is registered, as by the acts is directed, before the registering the memorial under which the subsequent purchaser claims(z).

It appears, therefore, that there are two cogent reasons

<sup>(</sup>x) Symms v. Lady Smith, Cro. Car. 299; Godb. 445.

<sup>(</sup>y) N. (2) to Shep. Touch. 116.

<sup>(</sup>z) Vide infra in this chapter, and chapter 16. (\*452)

why a memorial of the conveyance should be duly registered immediately after the execution of the conveyance; the one, that a prior incumbrancer might, during the delay, register his incumbrance; the other, that the delay (\*)might give an unprincipled vendor an opportunity of selling the estate to a bonu fide vendee without notice; who, if he registered his deeds before the registry of the first conveyance, would certainly prevail against the first purchaser.

## SECTION II.

Of Assignments of Terms.

A PURCHASER may require an assignment of all outstanding terms, of which he could avail himself in ejectment, to attend the inheritance; and if the purchaser leave them outstanding, he may not, perhaps, have the full enjoyment of his estate without, at some future period, being himself at the expense of getting them in: for even a mortgagee would be very unwilling to advance money on the estate, unless the terms were assigned, lest a subsequent mortgagee or purchaser, without notice, should obtain an assignment of them, and so overreach the prior mortgage.

I. The position that a purchaser may require an assignment of all outstanding terms, of which he can avail himself in ejectment, to attend the inheritance, naturally calls our attention to the cases in which a term may be used upon an ejectment. We have already seen that, in some cases, the possession of the cestui que trust may operate (\*453)

as a bar to his trustee(a). So where whilst fines could be levied a purchaser was not, at the time of his contract. aware of the term, and its existence would have endangered or affected his title, a fine levied, with five years (\*)non-claim, would have operated as a bar to the trustee of the term(b); although where the term had been assigned in trust for the purchaser, a fine levied would not affect it, because such a construction would be manifestly contrary to the intention of the parties(c). But as the law on these points was not well settled, it was laid down in the last edition of this work, as a general rule, that nearly all terms for years, however ancient, and notwithstanding any adverse possession or fines, might be required by a purchaser to be assigned to attend the inheritance; and where a term had once been assigned to attend the inheritance, although at a period very remote, and it had been since treated as a subsisting term by declarations in the subsequent deeds, that the person in whom it was vested should stand possessed of it in trust to attend the inheritance, a purchaser could not be advised to permit the term to continue outstanding, because it was clear that it might be used against him upon an ejectment. Nor was it any answer to a purchaser's claim, that the term has already been recently assigned to attend the inheritance. And the same rule should still be acted upon although fines are abolished, and the time of limitation is shortened by the late acts.

Where terms for years are raised by settlements, it is usual to introduce a proviso, that they shall cease when the trusts are at an end. In well-drawn deeds, this proviso always expresses three events: 1st, the trusts never

<sup>(</sup>a) Supra, p. 394.

<sup>(</sup>b) Iseham v. Morrice, Cro. Car. 109, 5th resol.; 2 Ventr. 329.

<sup>(</sup>c) Freeman v. Barnes, 1 Ventr. 80; 1 Lev. 270. See Smith v. Peirce, Carth. 100; Basket v. Peirce, 4 Vern. 226.

<sup>(\*454)</sup> 

arising; 2dly, their becoming unnecessary or incapable of taking effect; or, 3dly, the performance of them. But it frequently happens, in ill-penned instruments, that these events are not accurately expressed, or not all provided for; and in those cases it must be seen whether, in the (\*) events which have happened, the term has ceased, for if it has not, the purchaser must require an assignment of the term. To illustrate this doctrine, let us suppose a term for years to be created for raising a sum of money for the first son of A. who shall attain twenty-one, and that it is declared by the deed, that when the trusts are performed, the term shall cease. Now, in this case, if A. should not have a son who attains twenty-one, the trusts would not have arisen, and consequently could not be performed; and it seems that the term will not cease; the event which happened not being provided for in the declaration for cesser of the term.

In a late case(d), which has already been referred to, it appeared, that under a power Mr. Walsh Porter had, by deed, charged the estate in question with the payment of 5,000l. to the children of his then intended marriage, at such time or times, and in such proportions, and in such manner as thereinafter mentioned. And, by the same deed, in further exercise of his power, he appointed the estate to trustees for five hundred years, upon the usual trusts to raise the 5,000l. payable to sons at twenty-one, and daughters at twenty-one, or marriage, with the usual provision for raising maintenance in the mean time. And it was provided, that if no child should become entitled to the portions, or if the person or persons to whom the next estate of inheritance of and in the said manor, &c. in reversion or remainder, expectant on the determination of the said term of five hundred years, shall, for the time being, belong, do, and shall well and truly pay, or cause to be

<sup>(</sup>d) Hays v. Bailey, Rolls, 10th August 1813, vide supra, p. 345. (\*455)

paid, unto the said Edmund Lambert and Thomas Gorman (the trustees of the term), or the survivor of them, or the executors or administrators of such survivor, or well and sufficiently, to his and their good liking, secure to be paid (\*)the portion or portions hereinbefore provided, or intended to be provided, for such child or children, or so much thereof as shall be remaining unpaid (all such maintenance and interest as is hereinbefore mentioned being first raised and satisfied); and in case all and every of the trusts declared as aforesaid, of and concerning the said term, shall in all things be performed and satisfied, or shall be discharged, either by becoming incapable of being performed, or by any other means, and the trustees shall be paid their expenses, then the term should cease. The portions were paid to the personal representatives of the surviving trustee, with all interest and maintenance money up to the day of payment, by the reversioner, "in order," as it was declared, "to discharge the estates from the portions, and that the term might cease by virtue of the proviso contained in the deed of appointment;" and a regular release was executed by the trustees of the term upon receipt of the money. The estate was sold, and the purchase completed. The purchaser sold again; and it appeared, that one of the children was still under age; and it was insisted that the payment to the trustees did not discharge the estate from the portions. The seller filed a bill for a specific performance. It was argued, that the term in the event had ceased; but the Master of the Rolls (Sir William Grant) suggested, that, although the term might have ceased, yet the portions would still remain charged on the estate under the charge in the deed. It was, however, submitted, that the charge, and the term, and the trusts of it, must all be taken together. The portions would have been as much a charge on the estate under the trust of the term as they were under the express charge. If the term, which was the legal and substantial

security, was gone at law, it was impossible for equity to say that the charge yet subsisted. The very intention of the parties would be frustrated by such a decision. The (\*)portions were to be paid, according to the charge, to the children in the manner after mentioned; and one mode afterwards mentioned was a payment to the children through the medium of the trustees. The proviso was inserted to meet the very case which happened. The trustees were persons is whom the party making the charge reposed confidence and he, the creator of the trust, had expressly provided, that if the reversioner should be desirous to discharge the state before the children were capable of receiving the partions (for, if they were of age, the portions would, of cot se, be payable to themselves), he might pay the money the trustees for them, or even secure it to the good liking of the trustees. Equity had no power to say that this was not a discreet act, and that the portions, although paid to the trustees precisely as directed by the deed, sho ad, for the greater security of the infants, still remain charged on the estates. The term had unquestionably ceased at law; and the portions which it was raised to secure, had, of course, ceased with it. In support of the objection, it was argued, that the portions were not payable by the charge till the children attained twenty-one, and that they could not before that period be paid to the trustees, so as to discharge the estate from them. The Master of the Rolls said, that he was inclined to be of opinion, that the charge would run with the term which would r gulate the mode of payment; but he doubted whether the term would cease, for it was required, that "all such maintenance and interest should be first raised and satisfied." Now maintenance was to be raised till the children attained twenty-one. Then how can it be said that that is done until the child attained twenty-one? That circumstance must concur; all the trusts must be performed; it is in the conjunctive. His VOL. I.

Honor doubted therefore whether the charge would cease. Under these circumstances, he should think that (\*)the purchaser would not be forced to take the title; and therefore he overruled the exception to the Master's

report against the title.

This objection was not considered in the argument. It might, had the point been made, have been insisted, that the direction in the deed, that "all such maintenance and interest being first raised and satisfied," must be confined to maintenance and interest up to the time of payment of the principal. The interest was the fruit of the principal; and when the principal was paid, it would yield interest, and that would, of course, be the fund for maintenance. The ground taken against the title makes the reversioner still liable to pay interest under the charge in the deed, although he has paid off the principal, which will produce interest. Could he file a bill against the trustees to pay him the interest of the 5,000l. which he paid to them? Could the trustees file a bill against the owner of the estate for payment of the interest, although they had the 5,000l. in the funds? And, if not, does it not follow that the interest was no longer a charge on the estate? The construction, which depends on the general expression in the deed, wholly defeats the intention of the parties, that the reversioner might, at any time, relieve the estate from the charge altogether, upon payment of the portions. The power supposed to be reserved to the owner is, to pay off the principal, and yet leave the estate subject to the interest. The decision, in this case, proves, that the charge of the interest is as serious an objection to the owner's title as the charge of the principal. If, therefore, the payment of the principal has any operation, it is to make the owner pay ten per cent. interest instead of five. But, it is admitted, that the portions might be paid to the trustees before the children attained twenty-one. Now, as the maintenance and interest were to be first raised (\*458)

and paid, it must necessarily be intended, that the maintenance (\*) was such as had already accrued; for, how could the trustees raise by anticipation what might never become due? The proviso for cesser embraced, 1st, the event of there being no child who should become entitled to the portion; 2d, the payment of the portions to the trustees; 3d, the performance of the trusts. There are some general words in the proviso which are unskilfully introduced; but this was the intention, and the words are sufficient to effectuate it. The word and, introducing the third event, must, it is submitted, be read or; for the second and third events could not happen together. The case was afterwards heard upon appeal before the Lord Chancellor, but it had become unnecessary to decide the above point, and he gave no opinion upon it.

Where a portion is secured by a term of years, and the term is directed to cease upon payment of the money, and the estate is sold before the portion is paid, it sometimes happens that the purchaser is desirous to keep the term on foot, and the following plan has been adopted for that purpose.—A fictitious mortgage is first made of the term for raising the portion, to a friend of the purchaser's, in which the purchase is not noticed; then the estate is conveyed to the purchaser in the usual way, subject to the mortgage; and then, by a subsequent deed, the supposed mortgagee declares that he has been paid off, and that he will stand possessed of the term in trust for the purchaser, and to attend the inheritance. Now, this plan, although certainly ingenious, is, I fear, ineffectual. It is impossible to read the deeds bearing date, as they necessarily must do, within a day or two of each other, without seeing that the whole proceeding is fictitious; and if the term should be set up in ejectment, it would be quite open to the adverse party to insist that the deeds were nugatory. And when the fact is once established, that (\*459)

(\*)the portion was paid off without a bona fide mortgage, it should seem that the term must cease, by force of the proviso in the deed creating it, and that no artifice of the parties can keep it alive.

II. We may now consider shortly the leading rules on the doctrine of merger of terms of years, without a knowledge of which the practical conveyancer must frequently be at a loss to know of what terms to require an assignment.

Where a term of years and the inheritance meet in one

person in the same right, the term is extinct.

So a man cannot, Sir Edward Coke says, have a term for years in his own right, and a freehold in auter droit, to consist together (e); and he illustrates this rule by stating, that where a man, lessee for years, takes a feme lessor to wife, the term is extinct. But this position appears to be contradicted by the case of Lichden v. Winsmore (f), in which it was held, that if there be lessee for years, reversion for life to A, a married woman, and the lessee grant his estate to the husband, and then the wife dies, the term is not extinct, because the husband has the estates in several rights, for the freehold was in the wife, and the husband was merely seised in her right; or, to speak more correctly, the freehold was in the husband and wife, although in her right (g).

And it is clear, that if in a case like this, the coalition be not occasioned by the act of the termor, the term will not merge. Thus, the descent of the fee upon the wife of a termor for years after the intermarriage will not drown (\*)the term, because the estates do not coalesce by the act

<sup>(</sup>e) 1 Inst. 338 b. See 9 East, 372.

<sup>(</sup>f) 2 Roll. Rep. 472; 1 Ro. Abr. 934, pl. 10; Ben. 141; and see Thorn v. Newman, 3 Swanst. 603.

<sup>(</sup>g) See Polyblank v. Hawkins, Dougl. 329.

<sup>(\*460) (\*461)</sup> 

of the termor for years(h), and the term he holds in his own right, and the freehold in right of his wife. This was decided in the reign of James 1. by Fleming, C. J. and Fenner and Croke, Justices, against the opinion of Williams, Justice, who, even after judgment was given, said to the counsel at the bar that, as clear as it was that they were at the bar, so clear it was that the term was extinct; and in other respects expressed himself very violently, so that Sir Edward Coke's doctrine was not overruled without opposition.

Where, however, a husband termor for years, seised of the freehold in right of his wife, has issue by the wife, so that he is entitled, in his own right, as tenant by the curtesy, there seems reason to contend that the term will merge(i).

A term vested in a person as executor may belong to him beneficially; and it therefore seems, that if he purchase the reversion, the term will be extinct; although it is usual in practice to require an assignment of such a term on a future purchase of the inheritance; and this practice is sanctioned by an obiter dictum of Lord C. J. Holt's in Cage v. Acton(k), where he admitted (as a point perfectly clear) that if a man hath a term as executor, and purchases the reversion, this is no extinguishment. But in Brooke's Abridgment, it is in three several places(l) stated to have been held by the Judges Hales and Whorwood, in 4 Edw. 6, that if a man has a lease for years as executor, and afterwards purchases the land in fee, the (\*)lease is extinct; and this position is cited and not de-

<sup>(</sup>h) Lady Platt v. Sleap, Cro. Jac. 275; 1 Bulst. 118; Jenk. 2d Cent. pl. 38.

<sup>(</sup>i) See 1 Bulstr. 118.

<sup>(</sup>k) 1 Salk. 326; Com. 69; and see Webb v. Russell, 3 Term Rep. 393.

<sup>(1)</sup> Bro. Abr. Extinguishment, 54, Leases, 63, Surrender, 52.

nied in several cases(m), and is adopted by Rolle in his Abridgment(n). So in a case in Leonard(o), Dyer explicitly laid down the same doctrine; and it has been treated as clear law in two cases, one of which is reported by Hetly(p), and the other by Freeman(q). And in one case one of the Judges thought, that even the descent of the fee on the executor would merge the term(r), although Lord Chief Baron Gilbert justly questions this position(s). The rule, that a purchase of the fee by the executor shall merge the term, appears to be founded in reason as well as upon authority; for, as far as his own interest is concerned, there cannot be any reason why the term should not merge. It is admitted, however, on all hands, that the term shall not be extinct as to creditors, and this I am induced to believe, from Lord Raymond's report of Cage v. Acton, is all that Lord Chief Justice Holt meant(t), although his dictum is so generally stated in Comyns's and Salkeld's reports of this case. At any rate, it was an obiter dictum, and cannot affect a doctrine apparently so well established; and it is therefore submitted to the reader, that in a case of this nature the term must merge in the inheritance, except as to creditors.

But a man may have a freehold in his own right, and a term in  $auter\ droit(u)$ .

Therefore, if a man seised of the freehold intermarry with a woman termor for years, the term is not extinct, but the husband is possessed of the term in right of his (\*)wife, during the coverture, because he has not done

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(m) 3 Leo. 111; 2 Rolle's Rep. 472.
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<sup>(</sup>n) 1 Ro. Abr. 934, pl. 9.

<sup>(</sup>o) 4 Leo. 37, pl. 102.

<sup>(</sup>p) Het. 36.

<sup>(</sup>q) 1 Freem. 289, pl. 338.

<sup>(</sup>r) See 3 Leo. 112.

<sup>(</sup>s) See Bac. Abr. Leases, (R.)

<sup>(</sup>t) 1 Lord Raym. 520.

<sup>(</sup>u) 1 Inst. 338 b.

<sup>(\*463)</sup> 

any act to destroy the term, and it is cast upon him by the act of law(x).

So if the lessee grant the term to the wife of the lessor, it will not merge(y).

But if a man possessed of a term in right of his wife, purchase the freehold, there seems ground to contend, that the term will merge, inasmuch as the estates coalesce by his own act, and not as in the case of marriage, by the act of law; and accordingly in one case(z), Dyer held the wife's term to be extinct by the husband purchasing the fee; and Manwood, C. B. agreed with him; and the same doctrine appears to have been held in a case reported by Moore(a). Lord C. J. Hobart, however, seems to have been of opinion, that a purchase by the husband of the fee should not extinguish the term(b), and in this opinion Lord C. J. Holt appears to have coincided(c).

Upon the foregoing principle, if the lessee make the freeholder his executor, the term will not merge(d).

It was formerly holden, that a term for years could not merge in a term for years; but in Hughes v. Robotham(e), it was determined, that if there be two termors, he who has the less estate may surrender to the other, and the term will merge in the greater: 2dly, that although the reversion be for a less number of years than the term in possession, yet the term in possession shall drown in that in reversion.

- (x) Bracebridge v. Cook, Plo. Comm. 417; and see 4 Leo. 38; Godb. 2; Het. 36.
  - (y) Bracebridge v. Cook, Plo. Comm. 417.
  - (z) Godb. 2; 4 Leo. 3S.
  - (a) Mo. 54, pl. 157.
  - (b) Young v. Radford, Hob. 3.
  - (c) See 1 Salk. 326.
- (d) 1 Inst. 333 b; 1 Freem. 289, pl. 338. See Attorney-general v. Sands, 3 Cha. Rep. 19.
- (e) Hughes v. Robotham, Cro. Eliz. 302. See Bac. Abr. Leases, (S.) s. 2; Stephens v. Brydges, V. C. 1821, MS. accordingly.

(\*) It remains to observe, that before the statute of uses(f), if a termor for years was enfeoffed to uses, equity would not compel him to execute the estate so as to deprive himself of his term. The statute of Henry, by transferring the use into a possession, would have destroyed the estates of termors who were enfeoffed to uses; but to prevent this injustice, an express saving was introduced into the act of the rights of all persons seised to uses. Therefore, if a fine or feoffment be levied or made to a lessee for years to the use of others, the term will not be extinct, although if the statute had not been made, the term would have been extinguished at common law(g). So, where a termor for years was made a tenant to the præcipe, it was held that although the freehold vested in him drowned the term until the recovery was suffered, yet, when the recovery was perfected, the term should revive(h). And it seems that the same rule must prevail where the conveyance is by lease and release, although it has been strenuously argued, that as the lease for a year is a surrender in law of the prior term, the subsequent release to uses shall not bring the case within the saving of the statute of uses. There appears, however, to be no weight in this argument; a lease and release being a common conveyance, and deemed one assurance; and from one report of the case, in which the question arose, it seems that the Judges(i) thought that the term was not extinguished by the lease for a year(k).

It may here be remarked, that a deed purporting to be an assignment of an old term may, if that term has by

<sup>(</sup>f) 27 Hen. VIII. c. 10, s. 3.

<sup>(</sup>g) Chesney's case, Mo. 196, pl. 345; 7 Rep. 19 b, 20 a, cited.

<sup>(</sup>h) Ferrors v. Fermor, 2 Roll. Rep. 245; Cro. Jac. 643; Terrie's case, 1 Ventr. 280, cited.

<sup>(</sup>i) See 3 Keb. 310.

<sup>(</sup>k) Fountain v. Cook, 1 Mod. 127; best reported Bac. Abr. Leases,
(R.); S. C. by the name of How v. Stiles, 3 Keb. 283, 309; 2 Lev. 126.
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(\*)any accident ceased, operate as the creation of a new one. As in the common case of an assignment of a term in which the freeholder in reversion joins in granting, bargaining, selling, and assigning the term; if the old term has become void, it will be resuscitated by these words(l).

III. The expense of the assignment of any terms of years which a purchaser can require to be assigned to attend the inheritance, must be borne by the purchaser himself, but the title to them must of course be deduced at the expense of the vendor; and if a term has never been assigned to attend the inheritance, the vendor must bear the expense, not only of deducing the title, but also of the assignment of the term to a trustee of the purchaser's nomination to attend the inheritance.

The rule, that terms of years which have never been assigned to attend the inheritance, must be assigned to a trustee of the purchaser's nomination, at the vendor's expense, is not acknowledged by some gentlemen of eminence, who, on the contrary, insist that the purchaser must consider the term either as a protection, or as an incumbrance. If he deem it a protection, then they contend that he must assign it at his own expense. If, on the contrary, the purchaser treat the term as an incumbrance, they admit that the vendor must discharge the estate from it, and accordingly offer to merge the term at his expense. The general practice of the Profession, however, is certainly in favor of the purchaser's right to require an assignment of the term to attend the inheritance at the vendor's expense; and when it is admitted that the vendor may be compelled to merge the term at his own expense, it seems very difficult to contend that (\*)the purchaser may not insist upon its being assigned.

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<sup>(</sup>l) See Denn v. Kemeys, 9 East, 366. (\*465) (\*466)

A refusal to assign may, under these circumstances, be thought to be a mere subterfuge to avoid the expense of the assignment, and throw it upon the purchaser. If the purchaser insist upon an assignment of the term, it seems clear that the vendor cannot safely merge it, although the purchaser refuse to bear the expense of the assignment. The title appearing on the abstract is that on which the purchaser is to act, and consequently the vendor, after delivery of the abstract, ought not merely of his own authority to do any act to alter or affect the title; and a trustee of a term can scarcely be advised, after notice of a contract for sale of the estate (when he is by construction of equity become a trustee for the purchaser), to merge the term against the consent of his cestui que trust, the purchaser. It would be difficult, therefore, to establish any other rule than that which, it is apprehended, is generally adopted by the Profession.

In some cases, perhaps, assignments of terms may be

dispensed with.

In Willoughby v. Willoughby(m), Lord Hardwicke laid it down, "that where an old term had been assigned upon an express trust to attend upon and protect the inheritance, as settled by such a deed, or the uses of such a settlement described or referred to particularly, as it sometimes happens, and the conveyancer is satisfied that those uses of the inheritance have never been barred till his new settlement or purchase is made, he may very safely rely upon it, because the very assignment carries notice of the old uses(I). Nay, where the assignment has (\*)been generally in trust to attend the inheritance, and

## (m) 1 Term Rep. 763.

<sup>(</sup>I) Qu, this. If the person claiming under the settlement should sell the estate to two distinct purchasers, who were equally innocent, it seems that the second purchaser, by procuring an assignment of the term, might exclude the first purchaser during the term.

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the parties approve of the old trustees, they may safely rely upon it, especially in the cases of a purchase or mortgage, where, the title-deeds always are or ought to be taken in: for if he has the creation and the assignment of the term in his own hands, no use can be made of it against him. This, however, is never relied upon in practice. And a declaration of trust of a term never should be relied upon, unless all the title-deeds are delivered to the purchaser. A mere declaration of trust will not protect the possession against a subsequent purchaser bona fide, and without notice, who procures an assignment of the term; and it has even been held that the custody of the deeds, accompanied by a declaration of trust of the term, is, as against a bare declaration of trust, tantamount to an actual assignment (n). But, as we shall presently see, a case may perhaps occur, in which an assignment of a term would be a protection against a declaration of trust of it, accompanied by the deeds; so that a prudent purchaser will scarcely ever dispense with an actual assignment of an outstanding term(242).

Mr. Butler, in his learned and practical notes to Co. Litt. lays down the following rules respecting the cases in which a purchaser should or should not dispense with an assignment of outstanding terms(o).

"1st. It may be laid down as a general rule, that wherever a term has been raised for securing the payment of money, as the assignment of it by the trustee for the

- (n) Stanhope v. Earl Verney, Butler's n. (1) s. 13, to Co. Litt. 290. b.
- (o) See the 13th section of n. (1) to 1 Inst. 290 b.

<sup>(242)</sup> Of two equitable incumbrancers, he who has the preferable right to call for the legal estate, is entitled to preference; though he hath not actually got it in, nor got an assignment, nor even possession of the deed conveying the outstanding legal title; and though his lien is of subsequent date to the other incumbrance. Williamson v. Gordon's Exrs. 5 Munf. 257.

person entitled to receive, to a trustee for the person obliged to pay the money, is the best possible evidence of (\*)the payment of the money; it may be reasonably required as such.

"2dly. In case a term for years has been assigned to attend the inheritance, if, upon a purchase, all the deeds (as well originals as counterparts) by which the term was created or assigned are delivered to the purchaser, and he is satisfied that the trustee in whom it is there said to be vested has made no prior assignment of it, and that the vendor has not charged the estate with any intermediate incumbrance, it is difficult to say what possible use can be made of the term against him, or what good can be answered by requiring an assignment of it to a trustee of his own, unless it be to satisfy the requisitions of those to whom he may afterwards have occasion to mortgage or sell the estate.

"3dly. But if any of the deeds respecting the term are not delivered to the purchaser, or if he is not satisfied of the trustee not having previously assigned it, or of the vendor having made no intermediate incumbrance, it seems prudent to require an actual assignment of it to a trustee for him."

With respect to the second of the above rules, the attention of the purchaser should be particularly called to the requisite, that the vendor has not charged the estate with any intermediate incumbrance. A vendor may, by fraudulent representations, induce a purchaser to believe that the title-deeds are destroyed or mislaid: and if a purchaser acting under this impression should procure an actual assignment of a term from the person in whom it was vested, it seems impossible to contend that the person in possession of the deeds, although he claims a prior title to the inheritance (p), has any equity against

 <sup>(</sup>p) See 1 Pow. Mort. 4th edit. 510; Evans v. Bicknell, 6 Ves. jun.
 174; Martinez v. Cooper, 2 Russ. 198.
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(\*)the subsequent purchaser, who must not be prevented from making the best use he can of the term. It is evident, however, that the person having thus obtained an assignment of a term, must have considerable difficulty in using it as a sword to attack the possession of his adversary (q).

A purchaser may, in some cases, be entitled to the benefit of an outstanding term, although he has neither an assignment of it, nor the possession of the deeds relating to it. This doctrine will be discussed hereafter(r).

It may here be remarked, that where a term of years does not necessarily appear on the face of the conveyance, it should be assigned to attend the inheritance by a separate deed, and no notice should be taken of it in the conveyance of the fee, for the legal estate must prevail at law(s)(243); and it is a consequence of this rule, that where a term of years is assigned by the conveyance of the inheritance, or even mentioned in it as a subsisting term, the owner cannot safely bring an ejectment in his own name only, lest his action should be defeated by the production of the conveyance to him, in which it would appear that the legal estate was vested in his trustee. And here we may correct the common error of excepting the

<sup>(</sup>q) See ex parte Knott, 11 Ves. jun. 609.

<sup>(</sup>r) See post. ch. 17.

<sup>(</sup>s) See Doe v. Wroot, 5 East, 132; and the cases cited in the note to p. 138; which have overruled Mr. Justice Gundry's, Lord Mansfield's and Mr. Justice Buller's equitable doctrine as to terms of years. See Doe v. Pegge, 1 T. Rep. 758, n. (a), and several cases in Burr. Cowp. and Dougl.

<sup>(243)</sup> See Jackson v. Sisson, 2 Johns. Cas. 321. Jackson v. Pierce, 2 Johns. Rep. 221. Jackson v. Van Slyck, 8 Johns. Rep. 380, 2d Edit. Moore's Les. v. Pearce, 2 Hen. & Munf. 236. See also, Finley v. Williams, 9 Cranch, 164. Brown's Les. v. Galloway, 1 Peters' Rep. 299. Willink's Les. v. Miles, 1 Peters' Rep. 429. Penn's Les. v. Klyne, 4 Dall. 409. Jackson v. Chase, 2 Johns. Rep. 84. Jackson v. Dego, 3 Johns. Rep. 422.

term in the conveyance of the inheritance, as an incumbrance, although it is assigned to attend by a separate deed. This practice is very incorrect, for the term is a protection, and not an incumbrance; and the exception in the conveyance effectually defeats the advantages which (\*)might otherwise be derived from the term being assigned by a separate deed.

IV. Where trustees ought to convey to the beneficial owner, it will, upon a trial, be left to the jury to presume where such a presumption may reasonably be made, that they have conveyed accordingly, in order to prevent a just title from being defeated by a matter of form(t)(244).

But where the trustee of a term is not joined in an ejectment brought by his *cestui que trust*, and the jury state in a special verdict, or a special case, that the term still continues, the plaintiff cannot prevail at law, but will be defeated by the legal estate in his trustee(u)(245). This

<sup>(</sup>t) Lade v. Holford, Bull. Ni. Pri. 110, as explained in Doe v. Sybourn, 7 Term Rep. 2; and Roe v. Reade, 8 Term Rep. 118; and see Doe v. Staple, 2 Term Rep. 634; Tankard v. Wade, Irish Term Rep. 162; and Hillary v. Waller, 12 Ves. jun. 239.

<sup>(</sup>u) Goodtitle v. Jones, 7 Term Rep. 47; Roe v. Reade, 8 Term Rep. 118; and see Doe v. Staple, 2 Term Rep. 684.

<sup>(244)</sup> See Jackson v. Pierce, 2 Johns. Rep. 226. Jackson v. Moore, 13 Johns. Rep. 513. Doe v. Phelps, 9 Johns. Rep. 169. Doe v. Campbell, 10 Johns. Rep. 475.

<sup>(245)</sup> Cestuis que trust may support ejectment in their own names, in Pennsylvania; otherwise, they would be without remedy in the case of an obstinate trustee, there being no court of equity in that state: Kennedy v. Fury, 1 Dall. 72. An equitable title is sufficient to support the action. Chancery powers having devolved on the courts of law, are exercised through the instrumentality of jurors. Smith v. Patton, 1 Serg. & Rawle, 80. So, ejectment will lie against the vendor of real estate, on articles of agreement, after the tender of the purchase money. Hawn v. Norris, 4 Binn. 77. Minsker and Bale v. Morrison, 2 Yeates, 344. So, the vendor may maintain ejectment against the ven(\*470)

must inevitably happen where a term of years has been assigned to attend the inheritance upon a purchase of the fee, and the purchaser brings an ejectment in his own name only. It were clearly too much to presume a surrender of a term which the owner has so anxiously kept distinct from the inheritance(x).

This was so stated in the last edition of this work; but the point has since undergone much discussion, and the leading heads of the argument, and the present state of the law on this head, must now be retraced(I).

It has long been the policy of our Legislature to encourage the free alienation of real property, and secure the titles of bona fide purchasers. Our statute book abounds with laws having this tendency. The same spirit pervades (\*) the common law. We are told that the maxims of the common law, which refer to descents, discontinuances, non-claims and collateral warranties, are only the wise arts and intentions of the law to protect the possession and strengthen the rights of purchasers. A purchaser is a favorite of a court of equity. It is the settled law of that court, that if a man buy an estate fairly he may get in a term of years, or other incumbrance, although it is satisfied, and thereby defend his title at law against any mesne incumbrance of which he had not notice. It were idle to discuss the policy of our law. In a commercial country like ours, where one great stimulus to enterprise in commerce is the hope to possess territorial ownership, every one is interested in the free interchange of property, and the safety of purchasers. The danger of latent in-

<sup>(</sup>x) See Doe v. Scott, 11 East, 478.

<sup>(</sup>I) This was the statement in the 6th edition.

dee in possession, if the purchase money be not paid. Mitchell v. De Roche, 1 Yeates, 12. See further, Newhall v. Wheeler, 7 Mass. Rep. 189.

cumbrances renders it necessary that every possible guard should be thrown around purchasers. The policy of the law in this respect led to the received doctrine as to terms of years attendant on the inheritance. Abstractedly considered, nothing can be more absurd than that a purchaser of the fee should procure a term of years, created a century ago, to be assigned to a trustee for him. But with reference to the protection to be derived from such a term of years, it is of the deepest importance to a purchaser that he should keep it on foot. At law, every term of years in a trustee is a term in gross. This, which was distinctly laid down by Lord Hardwicke(y), should never be lost sight of. The moment that a court of law acts upon the term as a part of the inheritance, it strikes at the root of the settled doctrines of centuries, shakes the landmarks of the law of real property, and renders insecure the title of every purchaser in the kingdom. Our law permits the creation of terms of years for any period of time. Where a term, whether for one hundred or ten (\*)thousand years, is created by way of use, it invests the person to whom it is granted with a legal right to the estate during the period specified. It is not necessary by our law, that possession should accompany the legal estate in order that the title of the legal owner should continue unbarred. Possession by my tenant, or by a person with my permission, or acknowledging my title, is in law possession by me, and during such tenancy or holding my title remains unimpeached; therefore, although the legal owners of the fee of an estate have enjoyed it for the last one hundred years, yet that will not affect the existence of a term of years in the trustee to attend the inheritance, because the possession of the legal owner of the fee is the possession of the termor; their titles are consistent,

<sup>(</sup>y) 1 Term Rep. 765. (\*472)

and support each other(I). The owner of the fee is as a tenant at will to his own trustee. It frequently happens that the owner of the fee is indebted to the term of years for his peaceable possession; such a possession, therefore, operates as a continual acknowledgment of the legal title of the termor, and proves its efficacy. The term is anxiously assigned to attend the inheritance; it does accordingly attend the inheritance; and the performance of the very service for which it was created never can be a ground for defeating its legal operation. Upon principle, therefore, a term of years assigned to attend the inheritance ought not to be presumed to be surrendered unless there has been an enjoyment inconsistent with the existence of the term, or some act done in order to disavow the tenure under the termor, and to bar it as a continuing interest. This has always been the received opinion of the Profession, and particularly of that class of the Profession to whom titles are more particularly referred. It matters very little what is the opinion of any individual (\*)conveyancer; but the opinion of the conveyancers, as a class, is of the deepest importance to every individual of property in the state. Their settled rule of practice has accordingly, in several instances, been adopted as the law of the land, not out of respect for them, but out of tenderness to the numerous purchasers who have bought estates under their advice.

As judgments, and other incumbrances, are infinite, and it is impossible to rely even upon searches for them, the doctrine, that a term of years attendant on the inheritance should protect a purchaser against incumbrances of which he had not notice, was long since established. This rule of property was shaken in the time of Lord Mansfield, when the courts of law broke down the boundary between them and courts of equity: but the barrier

<sup>(</sup>I) See now the 3 & 4 W. 4, c. 27.

has since been restored, and equitable doctrines are no

longer acted upon in courts of law.

Now, with a view to discuss at large the doctrine of presuming a surrender of a term assigned to attend the inheritance, let us suppose a term of years to be created in the year 1700, by way of mortgage. B. buys the fee in 1760, and pays off the mortgage, and the term is assigned to a trustee for B., his heirs and assigns, and to attend the inheritance. B. lives till 1819, without disturbing the term, or in any manner recognizing its existence. Can it be contended that a surrender of the term should be presumed? Was not B.'s possession consistent with the existence of the term immediately after the assignment in 1760? If so, when did it become adverse to it? What necessity was there for any act recognizing the existence of the term whilst B.'s continued possession was consistent with the term, and was supported by the trust upon which it was assigned? If the term ought to have been recognized from time to time, how often should this act be repeated; once a week, or once a month? Is there (\*) any ground upon which, in 1819, a surrender can be presumed on the strength of B.'s possession, which would not be equally operative the first week, nay, the first day after the purchase in 1760? In the absence of evidence of a surrender, it is impossible, on any sound principle, to presume one; unless the precise instant can be pointed out when the owner of the inheritance was desirous no longer to have the benefit of the term. Without his presumed concurrence a surrender cannot be presumed; for the trust was not to surrender the term, by which means incumbrances might be let in, but expressly to keep it on foot, in order to exclude them. A surrender by the trustee, therefore, without the direction of his cestui que trust, would be a breach of trust. It is said that the expense of making out a representation to a termor makes the (\*474)

term a burden instead of a benefit to the owner of the fee. It is not, however, denied that the owner of the fee may keep on foot a term attendant on the inheritance, and that no court of law can control his power to do so. Where he has exercised his power, and declared, without any limitation of time, that the term shall be attendant on the inheritance, and be in trust for him, his heirs and assigns, does not this mean that the inheritance shall be so attended during all the years to come in the term?and if it do, what power has a court of law out of a morbid compassion for him, on account of the expense which it may occasion, to presume a surrender of the term which he has so anxiously kept on foot? particularly as at the very moment that a surrender of the term is presumed, its existence may be required to protect the estate against a latent incumbrance; and the Court has no means whatever to ascertain whether there is any such incumbrance. The amount of the expense, too, must depend upon the particular circumstances of each case: and yet it would hardly be desirable that the rule should depend on the quantum (\*)of expense which an assignment would occasion. If, however, expense is to be adverted to, on that ground alone surrenders should not in such a case be presumed; because that doctrine would weaken a purchaser's reliance on any given term of years; he would in almost every case search for judgments. This could not be done without expense; and where a man has been in the habit of confessing judgments, it very seldom happens that satisfaction is entered upon them when they are paid off. This leads to great expense, and difficulty in practice; because a purchaser expects the judgments to be regularly discharged; and where even a few years have elapsed since the payment of the debt, if the creditor is living and can be traced, yet he hesitates to do any further act in relation to a transaction which he considered long since closed. (\*475)

If the surrender of the term cannot be presumed at B.'s death in 1819, we will suppose the estate to descend to B.'s heir at law. Now no man ever heard of an heir at law executing a deed for the sole purpose of recognizing terms of years attendant on the inheritance, or taking assignments of them to new trustees to attend, where they had already been assigned to trustees of his ancestor's nomination for that purpose. His possession, however, comes in the place of his ancestor's; and why should he be deprived of the guard which his ancestor created for his benefit? If his ancestor's possession was the possession of the trustee, it will not be denied that his possession stands in the same relation. The trust is to attend the inheritance, and for B., his heirs and assigns; therefore, under the express words of the trust, the heir is entitled to the benefit of it, and his possession is the possession of the trustee.

Suppose further, that B.'s heir, in 1820, makes a marriage settlement without noticing the term of years, could (\*)the term on that account be presumed to be surrendered? It is not the practice upon a marriage settlement to reassign attendant terms to new trustees; and no prudent practitioner declares the trust of attendant terms by the settlement, lest the parties upon an ejectment should be defeated by the production of their own conveyance, upon the face of which it would appear that the legal estate was outstanding; and I never saw or heard of a separate declaration to that effect on a marriage. In short, it is not the practice to advert to terms of years on a marriage settlement, or on a devolution from ancestor to heir, although, no doubt, that may have been done, and with propriety, in some particular cases. It is very rare indeed, that upon a marriage the title is investigated. In ninetynine cases out of a hundred, the parties take up the title with the settlement, conveyance, or will, under which

the husband or wife immediately claims. This is a fact. In very few instances, and those are upon the marriages of persons of consequence, is the title investigated; and it has never been the custom to take a new assignment, or make a declaration of trust of a term before assigned to attend the inheritance. At the time of the settlement, a fraud by the husband is not contemplated. No purchaser or mortgagee would accept the title without inquiring for a settlement; and as the wife would, in most cases, be entitled to dower if there was no settlement, her concurrence in a fine would be required, and that would at once lead to a discovery of the settlement. Neither is it usual to deliver to the trustees of a marriage settlement the deeds relating to the term. The tenant for life, it is settled, is entitled to the custody of the deeds. The trustees have merely the custody of one part of the settlement.

If B.'s heir was entitled to the benefit of the term in 1820, when he made the settlement, can the execution (\*)of the settlement deprive him of its aid? Is the act inconsistent with the existence of the term? Was it not declared to attend the inheritance, and to be in trust for B., his heirs and assigns? Suppose the heir, as is usual, to take a life-estate under the settlement, and to be in of the old use, can it be contended that this portion of the old use is inconsistent with the title of the trustee, although the latter was consistent with the use in fee in the heir? Why should an act be done to recognize the term? The assignment of the term to attend the inheritance speaks at all times, whilst the possession is consistent with the title of the trustee of the term. The universal practice, not to require assignments of attendant terms on descents or settlements, proves unequivocally the opinion of the Profession, that the possession of the heir, and of the persons claiming under the settlement, is in law the possession of the trustee of the term. Length of time in this case is unimportant. If we alter the above dates, and state B.'s purchase to be in 1800, his death in 1805, and the settlement in 1810, the principle is precisely the same; and it would startle most men to hear, that because the term had not been recognized since its assignment in 1810 a surrender of it may be presumed.

If, however, the term is a subsisting interest after the settlement, let us suppose the life-estate of B.'s heir under the settlement to be sold immediately afterwards, without the purchaser taking an assignment of the term; does this let in the presumption of the surrender of the term? Now the term, it must be repeated, was assigned to attend the inheritance, and in trust for B., his heirs and assigns. If the possession of the heir and his family under the settlement was not adverse to the title of the termor, how could the title of the purchaser be so? The term is a benefit, originally assigned as such, and not an incumbrance. A man should at least reject a benefit, or act inconsistently (\*) with the intention of the person bestowing it, before he is presumed to repudiate it. The event, if the event is to be looked at upon which this question hinges, shows that he required the protection of the term more than any of the former owners; and if his acts are to be adverted to, we shall find him anxiously obtaining a further assignment of the term. For let us further suppose that B.'s heir, before his settlement, confessed a judgment which was not satisfied, and that the purchaser bought without notice of it, and when he did discover it, procured an assignment of the term to a new trustee, and set up the term as a defence against an execution upon the judgment: Unless the presumption of the surrender is an inevitable conclusion from the fact of the purchase, it must be admitted that there is no ground to presume a surrender. But can it possibly be laid down as a rule, that every (\*478)

attendant term must be presumed to be surrendered against a purchaser who does not take an assignment of the term, or a declaration of the trust of it at the time he purchased? Why should he do so whilst his possession is consistent with the title of the termor, and expressly within the limits of the original trust? Would not an assignment, a week, or a month, or a year afterwards, before any adverse claimant appeared, be sufficient to keep the term on foot? If so, when, at what precise moment does the presumption arise?

Where an easement, for example, is enjoyed, or having been enjoyed is discontinued to be used, the user or non-user forcibly lets in the presumption of a grant in the one case, and a surrender in the other. But there the act speaks for itself. The whole argument in our case is, that there is a continued enjoyment under the original trusts, which embrace all the persons who have successively enjoyed the estate. Therefore, as an enjoyment of the easement would of itself, without any further assertion of right or declaration, (\*) exclude the presumption of a surrender, so here the continued enjoyment must have the same operation.

Does then the appearance of the adverse claimant weaken the purchaser's case? So far from it, that in the great majority of the cases in the books the protection was not sought for until the necessity for it appeared. Equity does not regard notice at the time of getting in the term. The notice, to operate, must be fixed upon the party at the time of the completion of the purchase. Equity too will assist a purchaser where he has not got an assignment of the term, but has the better title to it. At law, the term is a term in gross, and the courts of law ought not to enter into a consideration of the equities of the parties; because they have not the necessary machinery to enable them to come to a due conclusion on the equitable rights. It has been decided in equity, that if

a mortgagor, after a defective mortgage in fee, confess a judgment, the judgment-creditor, although he has the legal title, shall be postponed to the mortgagee(z). So it has been held(a) that a prior mortgagee, having a subsequent judgment, may tack the judgment to the mortgage; but a prior judgment-creditor getting a subsequent mortgage, cannot do so, because the judgment is not a specific lien upon those lands, that is, he does not go on the security; he has not trusted to the credit of the estate. A judgment-creditor therefore does not, in equity, stand on the same footing with a purchaser of the estate itself. In a case(b) where there was, 1st, an act of bankruptcy by A.; 2dly, a settlement for valuable consideration by him, without notice to the parties of the act of bankruptcy; and 3dly, a commission against him; although (\*)the commission over-reached the settlement, yet the persons claiming under it were held to be entitled to the benefit of an outstanding term created prior to the bankruptcy.

These cases show the rules of equity which flow from the anxiety of the Court to strengthen the title and protect the possession of purchasers; but if at law the outstanding term is to be presumed to be surrendered, they will no longer afford any protection to purchasers.

Some stress, in favor of the presumption, has been laid on two circumstances; the one, that the estate has been quietly enjoyed; the other, that the deeds relating to the term are in the hands of the owner of the estate. The first circumstance, I have already endeavored to prove, is against the presumption of a surrender. The latter can never operate in favor of the presumption, unless

<sup>(</sup>z) Burgh v. Francis, 1 P. Wms. 279, cited.

<sup>(</sup>a) Anon. 2 Ves. 663; Brace v. Duchess of Marlborough, 2 P. Wms. 491.

<sup>(</sup>b) Wilker v. Bodington, 2 Vern. 599.

<sup>(\*480)</sup> 

the courts of law deny the power of a man to keep an attendant term in a trustee and the deeds in his own possession. In no case does the trustee of the term keep the deeds. They form part of the muniments of title, and are kept as such by the owner of the fee. If it be necessary upon a sale to covenant for their production, by whom but the owner should the covenant be entered into? and the covenant should of course be entered into by the person holding the deeds. The trustee of the term, even if the deeds were deposited with him, could not be compelled, and would not be advised, to covenant for the production of them. Besides, the case of Doe v. Scott, which will be referred to presently, fully answers that objection. That the judgment-creditor has not the possession of the deeds, and therefore the surrender, if there be one, is not likely to be in his hands, cannot surely be a ground to presume that there actually is such a surrender. If the judgment-creditor has the better equity, which is the true inquiry in these cases, he may (\*)file a bill against the purchaser, who would be compelled to answer, whether there was a surrender or not.

Suppose that the assignment, when it is taken, is made not by the original trustee, who is dead, but by his son, who has regularly taken out administration to him, does that weaken the case? Certainly the administrator could not know that his father had not surrendered the term in his life-time; but he was more likely to know the fact than any other person. For the family solicitor would of course peruse the deed on his behalf; and if a surrender had been made of the term, which probably would have passed through his office, he would not have suffered the son, as administrator, to execute an assignment of it. Besides, if some deed is, in the absence of all evidence of its actual execution, to be presumed, why should not a new assignment to attend be presumed, if that were

necessary to support the purchaser's title, rather than a surrender, which would operate to defeat it? For his possession was consistent with the term, and he trusted his money on the security of the estate itself, which the

judgment-creditor did not.

Fifteen years ago, it was very much the practice to leave terms already assigned to attend the inheritance, in the original trustees, and to be satisfied with a general declaration of trust of all attendant terms. It never occurred to the highly respectable persons by whom that practice was adopted, that a surrender of the terms could be presumed. It were difficult to contend that a mere general declaration is sufficient to keep the term alive, if without it the presumption of its surrender would be let The trustee of the term, by force of the original trust, becomes, without any further declaration, a trustee for the purchaser. Now if the trust be a trust for the purchaser, and the latter do no act amounting to a disclaimer of the benefit of the trust, how can it vary his rights, that (\*)he neglected to re-declare that which has already been expressly declared, viz. that the trustee should hold the term for the original owner, his heirs and assigns, and to attend the inheritance?

Lord Hardwicke, in Willoughby v. Willoughby, enters very fully into this doctrine. He admitted, that where an old term has been assigned upon an express trust to attend the inheritance as settled by such a deed, and the conveyancer is satisfied that the uses of the inheritance have never been barred till the new purchase or settlement is made, he may very safely rely upon it, because the very assignment carries notice of the old uses. Nay, where the assignment has been generally in trust to attend the inheritance, and the parties approve of the old trustees, they may entirely rely upon it, especially in the case of a purchase, where the title-deeds always are or ought (\*482)

to be taken in; for if he has the creation and the assignment of the term in his own hands, no use can be made of it against  $\lim(c)$ . Lord Hardwicke thus states cases in which terms may be safely left in the original trustee; but it never occurred to him that the circumstance of so leaving them would let in the presumption that they were surrendered.

It is said that this doctrine withdraws a large portion of the real property in the kingdom from the jurisdiction of the courts of common law. That, however, is not so; because the title of the termor is the legal one, and therefore those courts, in such cases, decide upon the legal title, which only is within their province. The term is set up, not in bar of the jurisdiction over the property, but in consequence of the rule of the court itself, which forbids an equitable tenant to recover against the legal title. If even the doctrine had the supposed operation, (\*)that would depend upon the law of the land, and if it required alteration should be altered by the Legislature. But the courts of law have been so anxious to support attendant terms, that it has been settled ever since the reign of Charles 2. that such a term shall not be barred, even by a fine levied by the owner of the fee, against the intention of the conusor; because such an owner of the inheritance must be taken as tenant at will to his trustee, and then his possession is the possession of the trustee(d).

Mr. Justice Buller observed, in Doe v. Pegge(e), that so long ago as the time of Justice Gundry, when an outstanding satisfied term was offered as a bar to the plaintiff's recovery, that Judge refused to admit it, saying that there was no use in taking an outstanding term but for

<sup>.(</sup>c) 1 Term Rep. 772.

<sup>(</sup>d) 1 Ventr. 82; 2 Ventr. 329; 1 Sid. 460.

<sup>(</sup>e) 1 Term Rep. 760, n.

the sake of the conveyancer's pocket; since which time, Mr. Justice Buller added, it has been the uniform practice, that if the plaintiff be entitled to the beneficial interest, he shall recover possession. It does not appear in what case Mr. Justice Gundry made this sweeping observation. It is, however, not law at this day, and indeed never was to the extent in which it was laid down; and Mr. Justice Buller lived to see the law on this subject restored, and his own opinions over-ruled (f). In the same case of Doe and Pegge, Lord Mansfield observed, that trusts are a mode of conveyance peculiar to this country. In all other countries the person entitled has the right and possession to himself; but in England estates are vested in trustees, on whose death it becomes difficult to find out their representatives, and the owner cannot get a complete title. If it were necessary to take assignments of satisfied terms, terrible inconveniences would ensue, (\*) from the representatives of the trustees not being to be found. Sir Edward Northey's clerk was trustee of near half of the great estates in the kingdom. On his death it was not known who was his heir or relative. So that, where a trust-term is a mere matter of form, and the deeds mere muniments of another's estate, it shall not be set up against the real owner. It must excite surprise, that Lord Mansfield should have imagined that any rule, whose tendency it was to subvert what was peculiar to this country, could long subsist while the peculiarity itself was allowed to exist. As well might you admit the rule which excludes the half blood, and yet, in the face of contrary evidence, presume that a brother of the half blood proceeded from the same couple of ancestors as the person last seised(I). Is the whole system of trusts

<sup>(</sup>f) See Doe v. Staple, 2 Term Rep. 684.

<sup>(</sup>I) This argument, in this and other passages, speaks of the law as (\*484)

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to be subverted because sometimes an obscure trustee dies without relations? Or is the legal estate to subsist, or not, according to the expense which a re-conveyance may occasion in any given case? This doctrine never could stand the test of an accurate investigation, and has long since been over-ruled. They who have best understood the doctrine of equity, have powerfully deprecated their adoption by courts of law.

In Goodtitle v. Morgan(g), a mortgage for nine hundred and ninety-nine years was made in 1761, by Jones, the owner of the fee. In 1767, Jones made a mortgage in fee to Morgan; and in July 1769 he made a mortgage in fee to another person. In 1768, the nine hundred and ninety-nine years term was assigned to a trustee for Jones, and to attend the inheritance. The first mortgage in fee (\*)was before that assignment, and the last after it. In December 1769, he made a mortgage in fee to Sprigg, and the term of nine hundred and ninety-nine years was assigned to a trustee for Sprigg, and he was allowed to recover in ejectment, on the demise of his trustee, against the two prior mortgagees in fee; although it was speciously argued, that if, previous to the conveyance in 1769 to Sprigg, the defendants had brought ejectments upon their mortgages, neither Jones nor his trustee could have set up his term as a bar to their ejectment; and that, if Jones himself could not set up the term, it seems to be absurd to say that those who claim under him can, for they cannot claim a greater estate than he had. But this argument did not prevail, although Mr. Justice Buller did not put the decision on the right grounds. The case is an authority for my position. It decides clearly that a surrender of the term cannot be presumed on the ground

(g) 1 Term Rep. 755.

it was. The reader is aware that the half blood is not now excluded, and that fines are abolished.

that the first mortgagee did not take an assignment or a declaration of trust of it. A second mortgagee, therefore, procuring an assignment of the term, must prevail at law, and also in equity, unless he had notice at the time he advanced his money of the first mortgage.

In Doe v. Staple(h), Lord Kenyon, C. J. said, that he extremely approved of what was said by Lord Mansfield in the case of Lade v. Holford, that he would not suffer a plaintiff in ejectment to be nonsuited by a term standing out in his own trustee, or a satisfied term set up by a mortgagor against a mortgagee, but would direct a jury to presume a surrender. He added, "I much approve of that; and where a surrender is presumed, there is an end of the legal title created by the term."

In Doe v. Sybourn(i), the same learned Judge said, that in all cases where trustees ought to convey to the beneficial (\*)owner, he would leave it to the jury to presume where such a presumption might reasonably be made; that they had conveyed accordingly, in order to prevent a just title from being defeated by a mere matter of form(k).

Now these rules, it will be observed, are not in favor of presuming a surrender of a term expressly assigned to attend the inheritance against a purchaser. The doctrine that a mortgager shall not set up an attendant term against a mortgagee does not warrant the presumption of a surrender in this case. In the former case, there are only the rights of the mortgagor and mortgagee still in question, and the presumption is made in favor of the mortgagee. The claim of a third person does not intervene. But does it follow that a surrender should be presumed, not as between the mortgagor and mortgagee, but as

<sup>(</sup>h) 2 Term Rep. 696.

<sup>(</sup>i) 7 Term Rep. 2.

<sup>(</sup>k) And see Goodtitle v. Jones, 7 Term Rep. 47; Roe v. Reade, 8 Term Rep. 118.

<sup>(\*486)</sup> 

between two innocent mortgagees, both claiming under the same mortgagor, where one, after the execution of both of the mortgages, has obtained an assignment of the term? Why is he to be deprived of the benefit of his diligence? Why is this plank in the shipwreck to be taken from him? The doctrine can with much less propriety be applied where the person who has obtained an assignment of the term is an actual purchaser of the estate, whilst the person whom he seeks to exclude by the term is a mere judgment-creditor, having only a general lien over all the seller's property, and who perhaps suffered the judgment to remain dormant many years. The objection is not, that a surrender cannot be presumed against an owner of the inheritance, but that the presumption ought not to be made against a purchaser of the inheritance, where the contest is between him and incumbrancers claiming under the seller, but of whose claims (\*)he had not notice. Even the case of Goodtitle v. Morgan, in the decision of which Mr. Justice Buller concurred, proves that the mere circumstance of executing mortgages without assigning the term, does not let in the presumption of a surrender against a subsequent mortgagee who takes an assignment of the term. Upon principle, it seems impossible to contend that the circumstance of the last mortgagee not procuring the assignment at the very moment he advances the money can let in the presumption of a surrender.

The rule, that where trustees ought to convey to the beneficial owner a jury may presume such a conveyance, in order to prevent a just title from being defeated by a mere matter of form, is not denied to be a wise one; but it does not apply to the case under discussion; for in this case the trustees ought *not* to surrender the term; to do so would be to commit a breach of trust; and the presumption, if it is made, has not the merit of preventing

a just title from being defeated by a mere matter of form, but lets in one title to the destruction of another, where the equities are at least equal; for if the subsequent purchaser has not equal equity with the prior incumbrancer, equity itself will deprive him of the protection of the legal term, although beyond dispute an existing one.

The case of Keene v. Deardon(l), proves, that possession, where it is consistent with the title of a trustee, cannot be deemed adverse to it; and that no presumption of a surrender can be made contrary to an express trust. This proves both the propositions in the case under discussion. Possession is certainly evidence of title, but it is not evidence of the quality of the title. It does not prove whether you are seised in fee, or have a mere chattel interest; nor does it prove whether your title is legal or equitable. And therefore possession may always (\*) be shown to be consistent with the title of a trustee of an attendant term. After an express trust to attend the inheritance, a surrender of the term should never be presumed where the rights of the cestui que trust are not invaded by the trustee, and the cestui que trust has done no act to disavow his right to the trust of the term.

The case of Doe v. Scott(m), is a strong authority against the doctrine of presumption. In 1727, Lord Oxford executed a mortgage for a term of one thousand years. In 1751, Lord Oxford executed a marriage settlement, wherein it was stated, that 27,000l., part of the lady's fortune, was to be applied to the discharge of the mortgage. Since that time no mention was made of it, nor was there any other evidence of its existence, till, in a mortgage-deed of the 3d of December 1802, this term, together with another outstanding term of 1709, was assigned to secure the mortgage-money. It was insisted

that a surrender of the term ought to be presumed, on two grounds: 1st, the recital in the deed of 1751, that there was an adequate sum to be applied in discharge of the mortgage, and no evidence of the term having been acted upon or recognized from that period until 1802, when it was assigned as an outstanding term; and, 2dly, the possession of the deed itself by Lord Oxford, the owner of the inheritance, which could not have happened unless the mortgage had been paid off. The learned Judge who tried the cause held, that although no notice had been taken of the term from 1751 till 1802, yet the owner of the inheritance having then joined with the representatives of the termors in executing a deed, in which it was recited that the term had not been surrendered, he thought that a surrender could not be presumed. The Court of King's Bench were of the same opinion. Lord Ellenborough, C. J. said, that there was no purpose of (\*)justice to be answered by presuming a surrender in this case; nor was it for the interest of the owner of the inheritance to have it assigned to a trustee to attend the inheritance.

Now this case went much farther than it is necessary to push the doctrine in the case under discussion. In 1751, a sum was appropriated to discharge the incumbrance; and as the deeds were in Lord Oxford's possession, the mortgage must have been paid off. The term had not been assigned to attend the inheritance, and, therefore, for fifty-one years, the period between 1751 and 1802, the term was an incumbrance, and not a benefit; and yet the assignment of 1802 was held to be evidence against a surrender. Why was it stronger evidence than the assignment of the term in trust for the purchaser in our case? Here, too, the term had been assigned to attend the inheritance, and therefore the possession was consistent with the express trust of the term; whereas in

Lord Oxford's case the freeholder's possession was only consistent with the legal title in the mortgagee, under the equitable rule, that the mortgagee, when paid off, became a trustee for the owner of the inheritance. It is said, however, that there it was for the benefit of the owner that the term should be kept on foot. What circumstance in the supposed case required that the term should be presumed to be surrendered? Was not the purchaser the owner of the estate? And was it not for his benefit that the term should be deemed a subsisting interest?

Lord Eldon's opinion does not accord with the doctrine of presuming surrenders of attendant terms. In Evans v. Bicknell(n), which was decided in 1801, that learned Judge observed, that it seemed to him rather surprising, if he might presume to say so, that Lord Mansfield, who (\*)concurred with Mr. Justice Buller in a great many of these equitable principles in a court of law, should not have attended to these distinctions, which perhaps will be found in the very principles upon which the Court of Chancery exists. Titles to property may possibly be found to be very considerably shaken by the doctrine of the Court of King's Bench as to satisfied terms. The law as to that here is, that a second mortgagee having no notice of the first mortgage, if he can get in a satisfied term, would do that which is the true ground of the decision, though it is not put upon that by Mr. Justice Buller; he would, as in conscience he might, get the legal estate, and by virtue of that protect his estate against the first mortgagee, having got a prior title, the conscience being equal between the parties. When once it is said at law that a satisfied term should not be set up in ejectment, the whole security of that title is destroyed; and therefore, even with the modern correction that doctrine has received in the late cases, which is, that you may set up

<sup>(</sup>n) 6 Ves. jun. 184. (\*490)

the term, though satisfied, and put it as a question to the jury, whether an assignment is to be presumed, it seemed to his Lordship very dangerous between purchasers; and the leaning of the Court ought to be that it was not assigned: and he fully concurred with Lord Kenyon, that it is not fit for a Judge to tell a jury they are to presume a term assigned because it is satisfied; but there ought to be some dealing upon it, or you take from a purchaser the effects of his diligence in having got in the legal estate, to the benefit of which he is entitled. Then suppose the law takes upon itself to decide the question between purchasers upon this subject, can it decide upon the same rules as courts of equity, as upon the question of notice? It will be said upon this doctrine a court of equity does inquire into this; and it is a rule of property in equity, and therefore ought to be a rule of property at law. But (\*) how has it become a rule of property in equity? equity, the first mortgagee may ask the second whether he had notice. If that defendant positively denies notice, and one witness only is produced, to the fact of notice, if the denial is as positive as the assertion, and there is nothing more in the case, a court of equity will not take the benefit of the term from the second mortgagee, placing as much reliance on the conscience of the defendant as on the testimony of a single witness, without some circumstances attaching a superior degree of credit to the latter. It is impossible, therefore, that the rule of property can be said to be the same as at law; and if it stands upon different principles, in fact, it is perfectly different.

In Maundrell v. Maundrell(o), which was decided in 1804, the question arose, whether a purchaser could protect himself against dower by a prior term of years, unless it was actually assigned to a trustee for him; and the

<sup>(</sup>o) 10 Ves. jun. 246.

Lord Chancellor ultimately decided that he could not; because such had been considered the general rule; but his Lordship, upon principle, thought that the purchaser would, as in other cases, be entitled to the benefit of the term without an actual assignment. He said that he doubted whether it was possible upon principle, to say the assignment of a term that has been once assigned to attend the inheritance, is necessary from time to time whenever that inheritance is made the subject of purchase(p).

The opinion of Lord Eldon therefore is, that an assignment of the term is not necessary upon every new purchase; and this is a powerful authority against the presumption of a surrender, on the mere ground that the term has been left undisturbed. Maundrell v. Maundrell is not an authority requiring an assignment in every (\*)case upon every new purchase; but whilst it establishes the necessity of an actual assignment, in order to bar dower, is a grave authority for the continued existence of the term in other cases, although it is left in the name of the original trustee(I).

In the late case of Doe on the demise of Burdett v. Wright, B. R. T. T. 1819, a term assigned in 1735, to raise an annuity, and subject thereto to attend the inheritance, was presumed to be surrendered. No act had been done to acknowledge the term, except that, upon a sale in 1801 of a small part of the estate, for redeeming the land-tax, the owner had covenanted to produce to the purchaser the deeds creating and assigning the term. There, however, the ejectment was by a person claiming as heir, against a person who claimed also as heir(q).

But in the cases of Doe v. Hilder, and Doe v. Stace,

<sup>(</sup>p) 10 Ves. jun. 259; and see p. 269.

<sup>· (</sup>q) MS.; S. C. 2 Barn. & Ald. 710.

<sup>(</sup>I) This also applies to the old law. Now a wife's right to dower is in her husband's power.

<sup>(\*492)</sup> 

B. R.(r),(II), which were decided afterwards in the same (\*)term, it appeared that the ejectment was brought by a judgment-creditor, who had issued an elegit against Richard Newman. In 1762 a regular mortgage-term of one thousand years was created by Francis Hare Naylor, the owner of the fee, and several other charges were made previously to and in the year 1770. In 1771, Naylor devised the estate to trustees, to sell. In 1779, they sold, and conveyed to John Newman in fee, and the one thousand years term was, in consideration of the payment of the mortgage-money, assigned by a separate deed (7th October, 1779) to a Mr. Denman, his executors, administrators and assigns, "in trust for the said John Newman, his heirs and assigns, and to be assigned, conveyed, and disposed of, as he or they should direct and appoint. And in the mean time, and until such appoint-

## " (r) MS.; S. C. 2 Barn. & Ald. 782.

<sup>(</sup>II) Another question of great importance arose in these causes, which it became unnecessary to decide, viz. whether the statute of frauds enabled a judgment-creditor, under an elegit, to take the term in execution. The statute, it is decided, did not intend to place the right of the creditor on the same footing against an equitable as against a legal estate; and it does not enable him to take in execution an equity of redemption, or a trust in a leasehold. Now every attendant term is at law a chattel real-a term in gross, and therefore cannot be taken in execution for the debt of the cestui que trust. The Legislature never intended to reduce a fee-simple estate with an attendant term to a level with a chattel interest, and to give the right of execution as if it were a chattel interest, where, under the same circumstances, a mere chattel interest would not be within the statute. The act in all its provisions is inaccurately framed, and it is not desirable that another new construction should at this day be given to it. A term outstanding has always been considered to protect against judgments; but if the construction above alluded to were to prevail, it would be necessary to search for judgments in every case, in order to ascertain whether any writ of execution had issued, or rather the term would be no protection, because it could not be discovered whether a writ had issued; but see Doe v. Phillips, 1 Crompt. & Mee. 450.

ment to attend and wait upon the freehold and inheritance of the same premises," to protect the same against mesne incumbrances. In October 1790, John Newman died intestate, leaving Richard his brother and heir. In November 1797, Richard died, leaving Richard, his son, his heir, then a minor. On 23d August 1808, the last named Richard gave a warrant of attorney to the lessor of the plaintiff to enter up judgment for 4,000l., which was immediately done. In 1810, Mr. Denman, the trustee of the term, died intestate, leaving John Denman, his son and next of kin. In October 1814, Richard Newman, on his marriage, settled the estate to the use of himself for life, with remainder over in strict settlement. In June 1810, he sold and conveyed his life-estate to his mother, and she devised the estate to the persons under whom the defendant claimed as tenant. In 1817, the (\*)lessor of the plaintiff issued an elegit, without having revived the judgment, and had an inquisition taken thereon, which was set aside for irregularity. In 1818, he revived the judgment by scire facias, and issued an elegit; and on 13th March 1818 an inquisition was taken thereon, and then the ejectment was brought. On 17th March 1819 (after the commencement of the ejectment), John Denman, as the son and next of kin of Mr. Denman, took out letters of administration to him, and by a deed, dated the 19th of the same month, he, by the direction of the devisees of the purchaser, in the usual and regular way, assigned the term to John Newman, a trustee for them, and to attend the inheritance. The deed creating the term was produced by the purchaser of the largest part in value of the estate comprised in it. The deed assigning the term to attend on the purchase by Mr. Newman, in 1779, and the last deed of assignment, were produced by the defendants. The learned Judge thought that the question as to a surrender ought to go to a jury. His Lordship told them, (\*494)

that it seemed to him that as a trustee was appointed forty years ago, and had never done any act, but that the party who was beneficially interested had always acted on the property, he (the learned Judge) could not consider an administration taken out but a week before the assignment as at all effective; that he considered to be done merely for the purpose of setting up this old term to defeat the plaintiff; and under such circumstances he should leave it to them to presume it had been surrendered, which according to the learned Judge's report the jury expressly said they did. The Court of King's Bench, after hearing the case argued at considerable length, and taking time to consider, confirmed the learned Judge's direction.

Lord Chief Justice Abbott delivered the following judgment, according to the short-hand writer's note:

(\*)" This was an action of ejectment tried before my brother Park at the last assizes for the county of Sussex. The title of the lessor of the plaintiff was upon a judgment recovered in the year 1808, against Richard Newman, for 8,000l. and a writ of elegit and inquisition thereupon in the year 1818, finding Richard Newman seised in fee of the premises in question. It was further proved, that the defendant occupied the land as a tenant, and had declared that he considered it to belong to Richard Newman, and had delivered to him a notice of a judgment received in June 1818, from the lessor of the plaintiff. On the part of the defendant it was proved, that on the 23d of June 1762, Francis Hare Naylor had conveyed the premises in question, inter alia, to Thomas Carter, for a term of one thousand years, by way of mortgage, for securing the sum of 6,000l.: That in the year 1779, the mortgage was paid off, and deeds were then executed, whereby, in effect, the term was assigned to William Denman, in trust for John Newman, a purchaser

of the premises, and to attend the inheritance: That in the month of October 1814, the said Richard Newman, to whom the premises had descended from the purchaser John Newman, made a settlement upon his intended mar-. riage, whereby he conveyed the premises to trustees and their heirs, to the use of himself for life, with a remainder to his intended wife for life, remainder to the issue of the marriage, and reversion to himself in fee: That in the year 1816, the said Richard Newman conveyed his lifeestate to Sarah Newman, the mother of Richard, as a security for 1,162l., which appears to have been money then due from him to her: That Mrs. Newman, the mother, died in the year 1817, having previously devised her interest to some other relations: That William Denman, to whom the term had been assigned in trust, to attend the inheritance as aforesaid, died about four years ago; and (\*)on the 19th of March last, his son took out administration to him, and executed a deed, purporting to be an assignment of the term, to a person therein named, in trust for the devisees of Mrs. Newman, the mother. Upon this evidence, two questions were made at the trial: first, whether the term might be presumed to have been surrendered and merged in the inheritance; and if it might not, then, whether it was a trust within the tenth section of the statute of frauds, so as not to stand in the way of the execution on the judgment. The learned Judge thought this a case in which a jury might presume a surrender of the term; and the matter being left to them, they found that the term had been surrendered. A motion was afterwards made for a nonsuit, according to leave given by the learned Judge. A rule to show cause was granted; and the matter was argued before us very fully and ably. The same two points were made; and with respect to the statute of frauds a further point also, it being contended, first, that the trust of a term of years is not within (\*496)

the tenth section of the statute; and, secondly, if it be, yet in this particular case, the statute would not help the plaintiff, because the termor must be considered as a trustee, not for the debtor, but for the devisees of Mrs. Newman, at the time of issuing the execution. Upon these points, however, it is not necessary for us to pronounce any judgment; because we are of opinion, that in this case the surrender of the term might lawfully and reasonably be presumed. It is obvious that if such a surrender had been made, it would not probably be in the power of the plaintiff to produce it, he being a stranger to the particulars of the title which his debtor had in the land. The principal ground of objection to the presumption was, that such a presumption had in no instance hitherto been made against the owner of the inheritance, the former instances being (as it was said) all cases of presumption (\*)in favor of such owner. But this proposition appears to be too extensively laid down. One of the instances in which it has been said that a surrender shall be presumed, is the case of a mortgagor setting up a term against his own mortgagee; and this is said generally, and without distinction, between a mortgagee in fee or for vears. But if such a term be set up against a mortgagee for years, and a surrender presumed, the presumption is made against, and not in favor of, the owner of the inheritance. It is made against his interest at the time of the trial, but in favor of his honesty at the time of the mortgage; for if the term existed at the time of the mortgage, he ought in honesty to have secured the benefit of it to the mortgagee at that time, and not to have reserved it in his own power as an instrument to defeat his mortgage; and upon the same principle on which a surrender is presumed in the case of mortgagor and mortgagee, we think it may reasonably be presumed in the present case; though the principle is applicable not to the judgment-VOL. I. (\*497)

creditor but to other persons. One of the general grounds of a presumption is the existence of a state of things which may most reasonably be accounted for by supposing the matter presumed. Thus, the long enjoyment of a right of way by A., to his house or close, over the land of B, which is a prejudice to the land, may most reasonably be accounted for by supposing a grant of such right by the owner of the land; and if such a right appear to have existed in ancient times, a long forbearance to exercise it, which must be inconvenient and prejudicial to the owner of the house or close, may most reasonably be accounted for by supposing a release of the right. In the first class of cases, therefore, a grant of the right, and in the latter, a release of it, is presumed. Where a term of years becomes attendant upon the reversion and inheritance, either by operation of law, or by special (\*)declaration upon the extinction of the objects for which it was created, the enjoyment of the land by the owner of the reversion, thus become the cestui que trust of the term, may be accounted for by the union of the two characters of cestui que trust and inheritor, and without supposing any surrender of the term; and therefore, in general, such enjoyment, though it may be of very long continuance, may possibly furnish no ground to presume a surrender of the term. But where acts are done or omitted by the owner of the inheritance, and persons dealing with him as to the land, which ought not reasonbly to be done or omitted, if the term existed in the hands of a trustee, and if there do not appear to be any thing that should prevent a surrender from having been made; in such cases the things done or omitted may most reasonably be accounted for by supposing a surrender of the term, and therefore a surrender may be presumed. We think there are such things in the present case. In the year 1814, Richard Newman, the debtor, and then owner (\*498)

of the inheritance, made a settlement upon his intended marriage, which took place immediately. Upon such an occasion, the title and title-deeds of the husband would probably be looked into by professional men on the part of the husband, at least, if not on the part of the wife also; and notwithstanding the assertion of one of the learned gentlemen who argued this case on the part of the defendant, and by whom we were informed that it is not usual on such occasions to take any notice of an outstanding satisfied term, we cannot forbear thinking that such a term always ought to be, and frequently is, in some way noticed, either by the deed of settlement, or by some separate instrument; because, if not noticed, and the termor not called upon to assign the term to the uses of the settlement, nor any declaration of trust made of it to those uses, it may afterwards be made an instrument (\*)of defeating the settlement. The title-deeds usually remain with the husband, and if he be driven by necessity to borrow money, he may meet with a lender who has no notice of the settlement, and by handing over his deeds, and obtaining an assignment of the term to him and other conveyances, give to him a title that must prevail both at law and in courts of equity against the settlement. The supposed practice of taking no notice of outstanding terms, on such an occasion, appears to have been insisted upon before Lord Hardwicke, in the case of Willoughby v. Willoughby, as applied to marriage settlements and purchases. But that very learned Judge, in giving his judgment in that case, says he had inquired of a very learned and eminent conveyancer, and could not find that there had been any such general rule; and he afterwards proceeds to say, "Where the assignment has been generally in trust to attend the inheritance, and the parties approve of the old trustees, they may safely rely upon it, especially in the case of a purchase or mortgage, where

the title-deeds always are, or ought to be, taken in; for if he has the creation and assignment of the term in his own hands, no use can be made of it against him." Such instances as these may account for the practice in many cases, but cannot constitute a general rule. If in the present case it had appeared that the deeds relating to the term were delivered to the trustees of the marriage settlement as one of the securities for the settlement, the case would have stood on a very different ground. The marriage settlement, however, is not the only occasion on which we think it may most reasonably be supposed that this term, if existing, would have been brought forward. It appears that in 1816 the same Richard Newman, being then indebted to his mother, and desirous of giving her security for the debt, prevailed upon his wife to join with him in conveying to her the interest they derived (\*)under the settlement. Upon this occasion, an assignment of the term, or a delivery of the deeds relating to it, would undoubtedly have been most important acts in favor of the mortgagee, because they would have protected the mortgagee against any subsequent use of the term to defeat her mortgage. On both these occasions, therefore, the term, if existing, could not have been wholly disregarded without either want of integrity on the part of Richard Newman, or want of care and caution on the part of the professional men engaged in those transactions. We think it more reasonable to presume a prior surrender of the term, than to presume such deficiencies. It certainly might not unreasonably be left to a jury to consider to what cause they would attribute these omissions, and this was done at the trial. It is true, that an assignment of the term was taken in a few days before the trial, for the alleged benefit of the legatees of the mortgagee, Mrs. Newman, on whose behalf, we were informed, the present cause was defended. But this tardy act can-(\*500)

not be of any avail, and leads not to any presumption. The assignment was made by the administrator of the person in whom the term had been vested, and the administrator would probably be ignorant of any previous surrender made by the intestate. The time for dealing with the term on behalf of the mortgagee was the date of the mortgage. An actual assignment of the term is more regarded than its mere quiescent existence. It will defeat the title to dower, which its existence only will not, according to the case of Maundrell and Maundrell, Vesey, jun. vol. vii. page 567, and vol. x. page 246, and the cases there cited. These observations respecting the settlement and the mortgage receive additional force from the consideration of their dates. They were both long subsequent to the judgment, and they are the acts of a person materially interested in protecting the land from (\*)the judgment, and excluding all questions on the subject of priority, or otherwise; in the case of the settlement, for the sake of his intended wife, and the issue that he might expect by her; and in the case of the mortgage, for the sake of the mortgagee, to whom he was so nearly related, and who also was evidently a favored creditor. And it cannot be denied, that an actual assignment of the term would have been in many respects more operative against the judgment than its mere existence. In the case of the mortgage, it would have put an end to all question upon the statute of frauds, by making the termor specifically a trustee for the mortgagee before execution issued, according to the case of Hunt v. Coles, 1 Com. Rep. 226. For these reasons we think the verdict ought not to be disturbed, and the rule must therefore be discharged."

It will at once be observed, that this is a stronger case in favor of the existence of the term than that which we have been considering. There was no circumstance which pointedly called for an assignment of the term before the

period when one was made; for an assignment is never made by reason of descents, or of a marriage settlement. Previously to the sale, therefore, the presumption could not on any reasonable ground be let in; and if not, such a presumption ought not to have been made at all. There could be no doubt which ought to be preferred, the purchaser, or the judgment-creditor. The latter obtained his judgment on a warrant of attorney, and slept on his security for ten years, and never had a specific lien on the estate, but a general security riding over the whole of the seller's property; whereas the purchaser not only bought the estate itself without notice of the incumbrance, but had possession of all the deeds relating to the term, to the possession of which he was entitled as a purchaser. That circumstance alone, even as between two mortgagees of the estate itself, both equally innocent, would (\*) give the better right to the one holding the deeds(s). As between a purchaser of the estate and a mere judgmentcreditor, the rule applies with irresistible force. The purchaser, therefore, clearly had the better equity; and the presumption of the surrender, without any evidence upon which to ground it, let in the judgment-creditor on the estate in the hands of the purchaser, although, according to equity and good conscience, the creditor had no title to rank as such. The presumption too let in the judgmentcreditor on the estates provided for the wife and children by the marriage settlement; for the term could not be presumed to be surrendered against the purchaser, and in existence for the benefit of the wife and children. And yet counsel in very great practice never knew an instance of an attendant term being re-assigned on a marriage, and have suffered hundreds of settlements to be executed without requiring such an assignment; so that the provisions made for very many families may be deeply incumbered

<sup>(</sup>s) Stanhope v. Earl Verney, 2 Eden, 81. (\*502)

if this new rule is to be followed. It will not be contended that the subsequent conduct of the purchaser of the life-estate ought to affect the wife and children of the seller; and yet it is undeniable that the circumstance of the purchaser not taking an assignment of the term was relied upon as a strong ground in favor of the presumption. The assignment was made by Denman's administrator, who was regularly such as next of kin, and not a mere stranger, procuring a limited administration debonis non, for the purpose of assigning the term.

The above decision powerfully attracted the attention of the Profession. An ejectment was afterwards brought by the Newmans and Denman, against Putland, who recovered in the former ejectment, to recover back the estate(t). It came on at the assizes for Sussex, before (\*)Mr. Baron Garrow. Upon this ejectment the lessors of the plaintiff proved a mortgage in fee of the estate to Thomas Markwick, in August 1814, by Richard Newman the son, who afterwards made the marriage settlement. By this mortgage, which it had not been considered necessary to produce upon the former ejectment, all deeds were granted; and it contained a general declaration of the trust of all terms of years for the mortgagee. The assignment of the term from Carter of the 7th of October 1779, was delivered over to Markwick, and was contained in a schedule of title-deeds made at the time of the mortgage, and signed by Markwick. By a deed dated the 9th of September 1819, Newman, the trustee of the one thousand years term, declared that he would stand possessed of it in trust for Markwick, and to secure the mortgage-money due to him. It was argued on the part of the defendant that it would be inconvenient that one Judge should direct a jury to presume a surrender of the term, and another direct the contrary. In the mort-

<sup>(</sup>t) Doe v. Putland. See Bartlett v. Downes, 3 Barn. & Cress. 616. (\*503)

gage to Markwick there was no notice of any particular term, and no assignment was taken of the one thousand years term; Newman might therefore have parted with the term upon a new loan. The assignment in March 1819 was not at all for the benefit of Markwick; there was no acting upon the term from 1779 till 1819. No notice was taken of it in the marriage settlement. The learned Judge said, in charging the jury, that the facts were very different now to those proved on the former trial; and his present view was sanctioned by the suggestion in that very case. Here the deeds were handed over to the mortgagee before the settlement and conveyance, which accounts for the term not having been mentioned in those securities. The circumstance of the deed having been scheduled and handed over to Markwick shows that the term had not been surrendered. The (\*)learned Judge directed the jury to find a verdict for the plaintiff. The jury found that the term was subsisting, and reserved any question of law.

In Trinity term 1820 the defendant moved for a new trial; the learned Judge who tried the cause re-stated the point, upon which he directed the jury, and observed that the case had excited a great deal of attention, and had occasioned the observations which have already been submitted to the learned reader(u). The Chief Baron said, that he should like to have the point argued on the presumption of surrender. From his habits in Westminster Hall, his Lordship added, he had travelled more than most men through the law relating to this case, and he did not think the doctrine of presumption a correct doctrine. It is a very serious point; and of late the doctrine has been carried to a very frightful extent. Mr. Baron Graham observed, that he had never suffered these

<sup>(</sup>u) They appeared at the time in the shape of a letter from the author to Mr. Butler.

<sup>(\*504)</sup> 

presumptions, except in cases very strongly warranted, and where nothing was shown to the contrary. The Chief Baron added, that he never desired a jury to presume where he did not believe himself. The Court gave the defendant leave to argue the point upon the statute of frauds, upon a case to be stated(x). The point, therefore, as to the surrender of the term, was put at rest. The case upon the other point was prepared, but the suit has since been compromised, highly to the advantage of the Newmans.

The attention of Lord Chancellor Eldon was quickly drawn to the doctrine of the Court of King's Bench. In (\*)the Marquis of Townsend v. Bishop of Norwich, on the 27th January 1820, his Lordship observed :-

The legal interest in the advowson is unquestionably in Mr. Ainge, for a term of years, which, as I understand, has been expressly assigned to attend the inheritance. I do not inquire whether there may have been intermediate transactions since the creation of the term, which might induce some people to think a surrender of it should be presumed, further than to remark, that having in days, which perhaps may be thought days of yore, passed about two years, by no means unprofitably, in the office of Mr. Duane, and during which I had frequent opportunities of knowing the opinions entertained by Mr. Booth, Mr. Fearne, and other eminent conveyancers of that day, I well know that they were in the habit of proceeding on notions relative to satisfied terms, which, notwithstanding some modern decisions, I would not advise conveyancers to depart from (y).

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<sup>(</sup>x) It appears, therefore, that the presumption was made on the first ejectment, against the real facts and merits of the case as they ultimately appeared. This powerfully shows that such a presumption ought not to be made on light grounds.

<sup>(</sup>y) From Mr. Wilson's note. 73

Upon another occasion his Lordship observed: Formerly assignments were not considered necessary, because the old trustee would be a trustee for you, although you might not like him. It was never considered that the presumption of a surrender was to be made because some particular act had not been done. Lord Kenyon thought that some act must be done to presume a surrender; but now it is said, that if no act is done, you may presume a surrender: I cannot go the length which I see some late cases go, where there is no proviso. They have raised the presumption from a transaction where they say the term would have been assigned if not surrendered. I say that the circumstance does not let in that presumption; because the purchaser must know that the term will be held in trust for him, and he (\*)may leave it where it is, to save the expense of taking out administration(z).

His Lordship again took occasion to observe, in Hayes v. Bailey, 15th March 1820: There is now a modern doctrine of presuming surrenders. When I first came here, every old lawyer thought assignments of terms unnecessary; and as to the principle, that the term would be presumed to be surrendered if it had not been assigned on marriages, &c.; it was then thought that there was no occasion to assign, for if it had once been assigned to attend, the assignee will be a trustee for you. They then never thought it necessary to have it assigned on such occasions. I remember Mr. Lloyd used to say, that an old term was worth two inheritances. You see Lord Kenyon got as far as this before he would presume a surrender; you must show that there had been some dealing with it; but it seems to be the law now, that if you

<sup>(</sup>z) From the Author's note. (\*506)

show that there has been no dealing with it you are to presume it surrendered(a).

In the late case in the Exchequer, of Deardon v. Lord Byron, the Chief Baron again expressed his disapproba-

tion of this doctrine of presumption(b).

Upon the appeal in the House of Lords, in Cholmondley v. Clinton(c), the Lord Chancellor, with a reference to a deed of the year 1704, by which a term of two hundred years was created, with a proviso for the cesser of the term, but which, as the circumstances upon which that term was to determine had not taken effect, remained a subsisting term, and was assigned in 1811, observed:-"I would wish to call your Lordships' most particular attention to this part of the case, because, unless I now (\*)misunderstand, and unless I have misunderstood for a good many years, in which I have been laboriously, in different situations, discharging the duties which belong to the Profession of which I have the honor to be a member, the doctrine upon this subject, there arise out of the circumstances which I am about to mention many important observations bearing upon this case, with a great degree of importance, because bearing, unless I misunderstand the case very much, upon the titles to property in this kingdom. My Lords, this deed of 1704 provides, as I before stated, for the cesser of the term, that is, of the interest which the term creates. Let me suppose for a moment, that there had been no such declaration with respect to the cesser of the term, or what comes to the same thing, that the state of things has not vet arisen in which the term is to cease, that term created in 1704, would, according to all the ideas that I ever had of the law of this country (I am speaking now of what

<sup>(</sup>a) From Mr. Jacob's note.

<sup>(</sup>b) MS.

<sup>(</sup>c) MS. Doe v. Cooke, 6 Bing. 174; 3 Moo. & Payne, 411, S. C.

would have been done twenty-five years ago, instead of speaking particularly of the present time,) be considered as a term which, whether the instrument that created it or not did so declare, would be attendant upon the inheritance when the ends and trusts of it were satisfied; that is, it would be considered as a term, where neither presumption that it was satisfied, nor presumption that it was surrendered, would at that period have been entertained, unless there had been some dealing with the term which would authorize a presumption either of the one nature or of the other, but it would be taken to be, what, in the language of those who are now no more, I have often heard it stated to be, the best part of a title, namely, that old term that could be got in to protect the inheritance. And I conceive that such a term, whether there was any intention that it should or should not attend the inheritance, would be a term held in trust to attend the inheritance, (\*) protecting the equities of all who had equities during the existence of that term; all the estates, to a certain extent, that is, during the duration of the term, would be equitable estates, but protecting them all according to the due course, and order, and priority in which they existed, and according to their equities."

In giving judgment in the same case upon the hearing at the Rolls, Sir Thomas Plumer appeared also to be of opinion against the presumption in such cases (d).

Since the decision in Doe v. Hilder the point has been repeatedly debated before the different Masters in Chancery, upon objections taken by sellers to procure representations to terms of years, which, they insisted, ought to be presumed to have been surrendered; but the general and prevailing opinion has been that that doctrine cannot be maintained; and the Masters have acted upon that principle.

<sup>(</sup>d) 2 Jac. & Walk, 158. (5508)

And finally, in Aspinall v. Kempson, upon a motion before the Lord Chancellor for a new trial, in which some gentleman at the common-law bar cited Doe v. Hilder, his Lordship observed, "It is not necessary to consider much the doctrine of presumption with reference to the present case, but the case of Doe v. Hilder having been alluded to, and having paid considerable attention to it, I have no hesitation in declaring that I would not have directed a jury to presume a surrender of the term in that case; and for the safety of the titles to the landed estates in this country, I think it right to declare that I do not concur in the doctrine laid down in that case(e)."

We may, therefore, be justified in considering the law to stand as it did before the decision in Doe v. Hilder; and conveyancers of course will follow the advice of the (\*)Lord Chancellor, and not depart from the practice which they have hitherto followed.

In the recent case of Doe v. Plowman(f), where the term had been assigned to attend in 1789 upon a purchase, and in 1808 the purchaser settled the property upon her marriage, and afterwards devised the property under a power in the settlement, but neither in the marriage settlement nor of course in the will was any mention made of the term; it was held upon an ejectment by her heir-at-law that a surrender of the term could not be presumed. Lord Tenterden observed that the doctrine laid down in the cases above discussed he believed had been much questioned, and he inquired whether such a term as this was usually noticed in a marriage settlement, and upon receiving an answer in the negative, observed, "if that be so, there is no ground for presuming that this term which was assigned to attend the inheritance was ever surrendered."

<sup>(</sup>e) L. I. Hall, 5 Dec. 1821, from Mr. Walker's note.

<sup>(</sup>f) 2 Barn. & Adolph. 573.

The Vice-Chancellor, Sir John Leach, in two late cases upon specific performance, as between a seller and a purchaser, presumed a term to be surrendered which had not been assigned to attend the inheritance, and which for a long period had not been disturbed. The first case was Emery v. Growcock(g). The other case was ex parte Holman(h), where it appeared by the abstract of the title delivered to the purchaser, that, by indenture bearing date the 24th of December 1735, and made between Thomas Baker of the one part, and John Marsh of the other part, the said Thomas Baker did grant and demise, amongst other hereditaments, the messuage and premises in question unto the said John Marsh, his executors, administrators and assigns, for the term of five hundred years, (\*) subject to redemption on payment by the said Thomas Baker, his heirs, executors, administrators and assigns, unto the said John Marsh, his executors, administrators or assigns, of the sum of 205l. on a certain day therein mentioned, that the said sum was not paid accordingly, but that the same with all interest was paid to the executor of the said John Marsh on the 6th day of October 1750, as appeared by a receipt indorsed on the said indenture, but no assignment or surrender of the said premises comprised in the said term was ever made and executed, and therefore the purchaser insisted that the sellers should at their own expense discover the personal representatives of the said John Marsh, and procure an assignment from them of the said term to a trustee for the purchaser to attend the inheritance.

The Master to whom the title was referred was of opinion that the term of five hundred years was outstanding, and was then vested in the personal representative

<sup>(</sup>g) Mar. 1821, MS. 6 Madd. 54.

<sup>(</sup>h) 24 July, 1821, MS.; and in Townsend v. Champernown, 1. Yo.& Jerv. 538.

<sup>(\*510)</sup> 

or representatives of John Marsh the termor, but it did not appear by any evidence before him who was or were such personal representative or representatives; and the Master was of opinion that it was expedient and necessary that the said term should be assigned to a trustee for the purchaser, and that the expense of deducing the title thereto, and of procuring the said term to be so assigned, should be borne and paid by the vendors.

In an intermediate deed, dated in July 1749, the term was noticed, but in no other deed was it mentioned; and there were three conveyances of the fee upon sales, one in 1784, another in 1791, and the other in 1792. The Vice-Chancellor was of opinion that a surrender of the term must be presumed.

V. The importance of obtaining an assignment of all outstanding terms cannot be too strongly impressed on (\*)purchasers. If a purchaser has no notice, and happens to take a defective conveyance of the inheritance, defective either by reason of some prior conveyance, or of some prior charge or incumbrance, and if he also takes an assignment of the term to a trustee for him, or to himself, where he takes the conveyance of the inheritance to his trustee, in both these cases he shall have the benefit of the term to protect him; that is, he may make use of the legal estate of the term to defend his possession, or, if he has lost the possession, to recover it at common law, notwithstanding that his adversary may at law have the strict title to the inheritance (i)(246).

Lord Hardwicke was of opinion that the protection arising from a term of years, assigned to a trustee for a purchaser, should extend generally to all estates, charges

<sup>(</sup>i) Willoughby v. Willoughby, 1 Term Rep. 763, per Lord Hardwicke; and see For. 69.

<sup>(246)</sup> See Williamson v. Gordon's Exrs. 5 Munf. 257.

and incumbrances, created intermediate between the raising of the term and the purchase (j). And this doctrine, unqualified as it is, seems correct. For as the term will prevail over a strict title to the inheritance, it will of course be a protection against judgments, mortgages, and all other incumbrances and estates less than a fee; and it may, in like manner, be used as a shield against an act(k), or commission (l) of bankruptcy.

In the late case of the King v. Smith(m), however, the Court of Exchequer held that a term of years, which had been assigned to a trustee for the crown debtor(n), would not protect a purchaser against crown debts, although he purchased bona fide and without notice(I). This point (\*)had previously been considered by most of the leading characters in the Profession, some of whom have since filled the highest judicial situations; and the general opinion of the Profession appears to have been, that a purchaser might protect himself against crown debts, by a legal term of years created previously to the right of the crown attaching on the estates, where he had not notice,

(j) See 1 Term Rep. 768.

(k) Collett v. De Gols, For. 65.

(l) Hithcox v. Sedgwick, 2 Vern. 156, reversed in Dom. Proc. See post. c. 17, this point considered.

(m) Excheq. 2d March, 1804, MS. Appendix, No. 17.

(n) See 13 Price, 656.

<sup>(</sup>I) It has been determined that in the case of a purchase for a valuable consideration, without notice and without fraud or covin, from a simple contract debtor of the king, the lands are not bound by such simple contract debt. The King v. Smith, 1 Wight 34. In that case, the general words in the statute of 13 Elizabeth, c. 4, received a limited and proper construction. In Wild v. Fort, 4 Taunt. 334, in which it was not necessary to decide the point, the rule was laid down with apparently too much latitude, that every person who has received money belonging to the crown, every accountant of the crown for money of the crown received, falls within the act. See Casberd v. Ward, 6 Price, 411.

express or implied, of the debt due to the crown, or of the vendor being an accountant to the crown. They relied on the analogy between this case and the general rule respecting judgments and recognizances, against which a purchaser may protect himself by an outstanding legal estate, unless he had notice of them previously to completing his purchase. The late Lord Kenyon, in an opinion on this point, treated the right of the crown as not superior to that of a subject. Indeed, the point may fairly be said to have received what was tantamount to a judicial decision, previously to the determination of the Court of Exchequer. When Mansfield, Chief Justice of the Common Pleas, was Solicitor-general, he gave an opinion in favor of the right of the crown to extend lands in the hands of a mortgagee, although the legal estate had never vested in the mortgagor, but had been conveyed to the mortgagee by the trustees in whom it had been vested in trust for the mortgagor. The question underwent great consideration, and it was discovered that there was an old term of years, to the benefit of which the mortgagee was clearly entitled in preference to any (\*)other person, although it was not actually assigned to a trustee for him. The case was again laid before the Solicitor-general, who then wrote an opinion that the title of the mortgagee would be preferred to that of the crown. He stated, that upon a short inquiry before he wrote his former opinion, it had been represented to him, that estates held in trust for a debtor of the crown were usually seized under extents, and were considered as bound by his debts in the same manner as those of which he was legally seized. He had since desired a further search to be made, and was then informed that no instances were to be found in which a trust-estate of such debtor fairly parted with to a purchaser without notice had been deemed to be liable to the debts of the crown, and

in consequence of this information his opinion then inclined in favor of the mortgagee. And he gave a similar opinion on this point in the year 1801, so that he had not seen any reason to alter his opinion after a lapse of nearly twenty years.

The principal grounds of the determination in the King v. Smith were three:—1st, that the lands of a debtor to the crown might be extended into whatever hands they might have been aliened, subsequently to their becoming liable to the crown; 2dly, that the estates of which the debtor was cestui que trust might be extended; and 3dly, the decision in the case of the Attorney-general v. Sands(o). The two first positions of the Court may be admitted to be law, without, as it should seem, at the same time admitting that a purchaser cannot protect himself against the crown by an outstanding legal estate. Indeed it was the third ground upon which the Court principally relied, and built their decree.

The determination in the case of the Attorney-general (\*)v. Sands was, that the trust of a term attendant on the inheritance was not forfeited by the felony of the cestui que trust, because it was no more than an accessary to the inheritance, which was not forfeited. In the King v. Smith, the Court of Exchequer thought that the converse of this case must be taken to be true. The term was not forfeited, because the inheritance was not forfeited; but if the inheritance had been forfeited, the term must have been forfeited. The case of the Attorney-general v. Sands was decided in a court of equity, and appears wholly to depend upon the rules of equity as to attendant terms; and on the like principle, it may be thought that the same Judges would have denied relief against a purchaser in a case similar to that of the King v. Smith; and that no such relief could at this day be granted. If

<sup>(</sup>o) Hard. 2 Freem. 3 Cha. Rep. (\*514)

any remedy, therefore, lies against the purchaser, it must be at law. Now at law the term in the trustee is a term in gross. A legal title, prior to the right of the crown, must prevail at law; and the Court ought not to advert to the trust, only for the purpose of taking the protection of the term from the bona fide object of the trust, for even the arts of the law in introducing collateral warranties, discontinuances, and non-claims to protect the possession and strengthen the rights of purchasers, have been the subject of commendation from the great Lord Nottingham; and it is admitted that if the term be in gross, an assignment before any actual extent will stand good against the king's debt(p). Lord Hardwicke's decision in Willoughby v. Willoughby is an elaborate performance, and was certainly pronounced after great consideration. Every point was adverted to, and yet his Lordship lays the rule down generally, that a purchaser may protect himself against all mesne incumbrances by a (\*)prior legal term, and does not except the case of the crown. And in pronouncing judgment in the Attorneygeneral v. Sands, the Chief Baron observed, that the term was only kept on foot to avoid incumbrances which might affect the inheritance; and yet, although he was discussing the rights of the crown, he did not seem to consider that the term would not prevail over crown debts. It is not denied, that in general where a term is attendant on the inheritance, if the king extends the inheritance he shall have a right to the term(q); but the question here turns upon what, it is conceived, ought to form an exception to that rule, viz. a purchase by the person claiming the benefit of the term bona fide, and without notice of the claim of the crown.

It remains only to observe, that in this commercial

<sup>(</sup>p) 2 Vern. 390.

<sup>(</sup>q) See the 2d resolution in Nicholls v. How, 2 Vern. 389.

country, any decision which tends to clog the free alienation of property, and to render the titles of fair purchasers insecure, cannot but be productive of the most serious consequences, and well demands the interference of the legislature, if the law is too well settled to be over-ruled.

In a still later case(r), in which the case of King v. Smith appears to have been forgotten, where a man having agreed before marriage to purchase and settle estates, entered into bonds to the crown, and then made a purchase, and afterwards settled the estate according to the articles, it was held that a mortgage term assigned to attend upon the purchase did not protect the inheritance against the crown debt, because the settlement was voluntary. There was no covenant in the articles which specifically bound the lands. The assignment of the term therefore could not, it was held, defeat the right of the crown.

(\*)But where the term has never been assigned to attend for the crown debtor, it will not be affected by the claim of the crown in the hands of a trustee for a bona fide purchaser. Therefore, where upon a purchase a term of 1,000 years was limited to the seller to secure a portion of the purchase-money and subject to the term, the fee was limited to the purchaser; the mortgage was not paid off by the purchaser, but he sold the property, and the second purchaser paid off the mortgage, and took an assignment of the term to a trustee for himself to attend the inheritance: it was held that the term was not bound by the crown debt of the first purchaser(s).

Mr. Butler justly observes, that "a term should never be relied on, unless proof can be obtained easily, and at a small expense, of the instruments and acts in law, which

<sup>(</sup>r) Rex v. St. John, 2 Price, 317. See Rex v. Hollier, 2 Price, 394.

<sup>(</sup>s) Rex v. Lamb, 13 Price, 649; M'Clel. 402, S. C. (\*516)

must be proved to establish the creation and deduction of the term. It should also be ascertained, that its situation is such as enables the party entitled to it, to avail himself of it in ejectment(t)." And to enable the purchaser to avail himself of the term, it is indispensably necessary that he should not have notice, either express or implied, of the incumbrance or title against which he is desirous of using the term as a protection. Mr. Powell, indeed, although he admits that terms, the purposes of whose creation are answered, and which have been expressly assigned to attend the inheritance, will not be any protection to a purchaser of the inheritance who had notice of any judgments, &c. yet contends, that where a purchaser of the inheritance obtains a term in gross, the purposes of whose creation were not answered at the time of the purchase(I), or a (\*)term the purposes of whose creation were answered, but which had not been expressly assigned to attend the inheritance, but merely waited upon the freehold by construction of equity, such purchaser can defend his possession by the term, although he had notice of any intervening judgment.

This is an attempt to establish a *new* distinction between a term assigned upon an express trust to attend the inheritance, and a term attendant by the construction of equity, an attempt which Lord Hardwicke appears to have overruled in the case of Willoughby v. Willoughby; and it would be very imprudent for a purchaser of an estate in any case to rely on a term of years, as a protection against

## (t) N. (1), s. 13, to Co. Litt. 290 b.

<sup>(</sup>I) In this case the purchaser could of course defend himself against any subsequent incumbrancer to the extent of the subsisting charge on the term at the time of the purchase. It has, indeed, been thought that if there are two mortgagees, and the first in point of charge buy the inheritance, he lets in the other on the estate discharged of the prior mortgage. See, however, Kennedy v. Daly, 1 Scho. & Lef. 355.

any incumbrance, of which he has express or implied notice.

It is, however, settled by a series of authorities (u), (\*)that a purchaser may protect himself against the dower of the vendor's wife, by a term created previously to her right of dower attaching on the estate, although he had actual notice of the marriage, and of her title to dower; a protection, as we shall hereafter see(x), to which a purchaser with notice is not entitled in any other instance, or against any other person(I).

The term, however, must be actually assigned to a trustee for the purchaser, if it is intended to be used as a bar to the wife's dower(y)(247); because, by the rules of

- (u) Lady Radnor or Bodmin v. Rotherham or Vendebendy, Prec. Cha. 65; 1 Vern. 170. 356; 2 Cha. Ca. 172; Show. P. C. 69; Brown v. Gibbs, Wray v. Williams, Dudley v. Dudley, Prec. Cha. 97. 151. 241; and see Banks v. Sutton, 2 P. Wms. 700 (I); Hill v. Adams, or Swannock v. Lyford, 2 Atk. 208; Ambl. 6; Butler's n. (1) to Co. Litt. 208 a; Wynn v. Williams, 5 Ves. jun. 130; D'Arcy v. Blake, 2 Scho. & Lef. 387; and see supra, p. 358.
  - (x) Infra, ch. 16.
- (y) See Maundrell v. Maundrell, 7 Ves. jun. 567; 10 Ves. jun. 246, particularly the close of the judgment.
- (I) Note, this case is genarally thought to be over-ruled, but Mr. Powell has endeavored to show, that it is not affected by later decisions. See 2 Mort. 731, 4th edit.; and in a manuscript note of the Attorney-general v. Scott, penes auctorem (For. 138,) Lord Talbot is reported to have said, that the reason of the decree in Banks v. Sutton was different, for there the direction of the will was, that the legal estate should be conveyed to Sutton, and the wife married him on the expectation of that estate, and it was a fraud in the husband not to call for the settlement. See a fuller note of this case than that which is published, Appendix, No. 18. In the late case of D'Arcy v. Blake, 2 Scho. & Lef. 387, it was said by the Court, that what was thrown out by Sir Joseph Jekyll, in Banks v. Sutton, had been long over-ruled.
- (I) All these observations upon dower apply to cases not within the late act, for as to cases within the act, the husband alone can defeat the wife's right of dower. Vide supra, ch. 7.

<sup>(247)</sup> See Milledge v. Lamar, 4 Des. 617.

<sup>(\*518)</sup> 

equity, every term attendant on the inheritance follows it in its various modifications, and in the charges and incumbrances which attach on it, or are created in it(z); and therefore, upon the marriage of a man seised of lands of inheritance, in which there is a term outstanding, a right of dower attaches on the inheritance, by the act of law, and in equity the term is equally bound with the inheritance; and as the claim of a purchaser is not more favored in equity than that of a dowress, a purchaser will not be entitled to the benefit of an outstanding term, to the prejudice and in exclusion of a dowress. Indeed the decision(a), that a purchaser could defend himself against a claim of dower by a term assigned to a trustee for him, proceeded not on principle, but on the universal practice and opinion of conveyancers in that respect; for(b) the Court of Chancery and House of Lords were of opinion, that if they were not to permit that to be so, it would be to (\*)overturn the general rule which had been established and practised by many titles to estates, and tend to make such titles precarious for the future. The same reason does not apply where the purchaser neglects to take an assignment of the term; it having always been the general understanding and opinion of conveyancers, that to protect against dower, the term must be actually assigned to a trustee for the purchaser.

In Swannock v. Lifford(c), Lord Hardwicke appears to have considered it clear, and it was admitted at the bar, that if a man before marriage conveys his estate privately, without the knowledge of his wife, to trustees, in trust for

<sup>(</sup>z) See Charlton v. Low, 2 P. Wms. 328.

<sup>(</sup>a) Lady Radnor v. Vendebendy, Show. P. C. 69.

<sup>(</sup>b) Per Lord Hardwicke. See Butler's n. ubi sup.

<sup>(</sup>c) Butler's n.(1) to Co. Litt. 208 a; and see 2 P. Wms. 709. Note, in the case of Bottomley v. Lord Fairfax, Prec. Cha. 336, the Court did not advert to a conveyance made immediately before marriage.

himself and his heirs in fee, that will prevent dower; and it appears that this was practised by a reverend Judge of equity, Mr. Serjeant Maynard, who made a lease to his servant the day before his last marriage (d). But the counsel who argued for the respondent in Radnor v. Vendebendy, before the House of Lords, seems to have admitted, that if a husband, just before marriage, make a long lease on purpose to prevent dower, and the woman expecting the privileges which the common law gives to women married, survive him, equity may interpose; and this doctrine has been distinctly recognised by a learned Judge and author(e). And as this opinion may be supported by weighty reasons, a purchaser cannot, it is conceived, be advised to rely upon a legal estate, created in fraud of the rights of marriage, as a protection against the wife's dower(f) (248).

It hath been just observed, that by the rules of equity (\*)every term attendant on the inheritance follows it in its various modifications, and in the charges and incumbrances which attach on it, or are created in it. Now it is a consequence of this rule, that whenever the inheritance is conveyed or charged, the trustee of the term becomes a trustee for the person in whose favor the estate is conveyed or charged, to the extent of his claims on the estate. If the trustee have notice of such purchase or incumbrance, his conscience will be affected; and if he assign the term to a subsequent purchaser, or

<sup>(</sup>d) See Show. P. C. 71.

<sup>(</sup>e) Gilb. Lex Prætor. 267.

<sup>(</sup>f) As to settlements by women previously to marriage, in derogation of the marital rights, see Countess of Strathmore v. Bowes, 2 Bro. C. C. 345, 1 Ves. jun. 22. and the cases there cited, which may be thought, in some measure, to apply to the point under consideration.

<sup>(248)</sup> As to marital rights, See Ward v. Wilson, 1 Des. 401. Garner v. Garner's Exrs. 1 Des. 437. Taylor v. Heriot, 4 Des. 227. (\*520)

incumbrancer, it would be a breach of trust, and he would in equity be decreed to make satisfaction(g). A trustee, therefore, of a term to attend the inheritance, cannot be advised to assign the term to any purchaser or incumbrancer, unless he is satisfied that his immediate cestui que use has not done any prior act to charge the inheritance(h).

As a trustee ought to be satisfied, that the person by whose direction the term is assigned, is the person entitled to require the assignment, it is usual, by way of authority to the trustee, to recite all the instruments, &c. affecting the fee, from the time the term was created to the date of the deed of assignment; and this is very commonly done, even where the term has been assigned to attend the inheritance. In the latter case, however, such a recital is both unnecessary and improper; for the trustee can only be affected by the acts of his own cestui que trust; and therefore, where a term has been actually assigned to attend the inheritance, on a future assignment of it, it is only necessary to recite the deed creating (\*)the term, that by divers conveyances and assurances the fee became vested in A. (the person requiring the assignment); and that by divers assignments and acts in law, and ultimately by such a deed (the assignment to attend), the term became vested in the trustee, in trust for A.; and then any instruments affecting the fee, since the last assignment of the term, to attend the inheritance, should be recited.

VI. Before we quit this very interesting subject, let us inquire in what cases a term of years will attend the

<sup>(</sup>g) 1 Term Rep. 771.

<sup>(</sup>h) See 1 Pow. Mort. 507, 508, 4th cdit.; Evans v. Bicknell, 6 Ves. jun. 174. Ex parte Knott, 11 Ves. jun. 609.

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inheritance, without an express declaration of trust for that purpose(i).

First, then, it is a general rule, that whenever a term would merge in the inheritance if united, it shall attend, if in a different person, without an express declaration, by implication of law founded on the statute of frauds(k). And the custom of London shall not prevail over this operation of law(l).

Therefore, where a person purchases the inheritance in his own name, and takes an assignment of a term in the name of a trustee(m); or takes a conveyance of the fee in the name of a trustee, and an assignment of a term in his own name(n); in both these cases the term attends the inheritance, unless there be an express declaration to the (\*)contrary, whether the term be purchased or obtained before or after the purchase of the fee. And in general there is no difference between an assignment of a term to a trustee, in trust to attend the inheritance, and an assignment to a trustee, in trust for the purchaser, his executors, administrators and assigns(o).

- (i) See an admirable opinion of Mr. Fearne's respecting terms of years, 2 Coll. Jur. 297. Mr. Powell has in the last edition of his Treatise on Mortgages inserted this opinion without acknowledgment. See 1 Mort. 483—489.
  - (k) See 1 Bro. C. C. 70.
- (l) Greene v. Lambert, 1 Vern. 2, cited; Dowse v. Derivall, ibid. 104; 2 Vern. 57; Reg. Lib. A. 1683, fol. 283. It is said in the decree, that the lease and conveyance were in law one conveyance; Rich v. Rich, 2 Cha. Ca. 160.
- (m) Tiffin v. Tiffin, 1 Vern. 1; 2 Cha. Ca. 49. 55; Whitchurch v.
   Whitchurch, 2 P. Wms. 236; 9 Mod. 124; Gilb. Eq. Rep. 168; Goodright v. Sales, 2 Wils. 829.
- (n) North v. Langton, 2 Cha. Ca. 156; Dowse v. Derivall, 1 Vern. 104; Attorney-general v. Sands, 3 Cha. Rep. 19.
- (o) Best v. Stamford, Prec. Cha. 252; Tiffin v. Tiffin, 1 Vern. 1; Holt v. Holt, 1 P. Wms. 374, cited; Pitt v. Cholmondley, Chancery, 9 Nov. 1751, MS.

So the same rule prevails where a man possessed of a term for years contracts for the inheritance, for the vendor stands seized in trust for the purchaser from the time of the contract (p).

And where, by reason of an intermediate term outstanding, a term cannot merge, although vested in the purchaser together with the fee, yet if the purchaser be entitled to such outstanding term, even the term vested in the purchaser, and which cannot merge, shall attend the inheritance, without any express declaration for that purpose(q).

And even if the purchaser cannot obtain an assignment of the whole term, yet, if a nominal reversion only, as a reversion of a few days, be left outstanding, so much of the term as is assigned to a trustee for the purchaser will be deemed attendant on the inheritance, without any express declaration for that purpose. But where the term is subject to rents or charges in favor of other persons, whereby the purchaser has not substantially the whole beneficial interest in the estate, there an express declaration is necessary to make the term attendant. The mere intent of the purchaser to purchase the whole interest, (\*) and that the term should attend the inheritance, will not vary the case.

The two last propositions appear to be established by the case of Scot v. Fenhoullet(r). From the imperfect statement of the facts in this case, it is difficult to understand the ground of Lord Thurlow's decision; and it has been generally thought that the decree turned on the

<sup>(</sup>p) Capel v. Girdler, Rolls, 16th March 1804, MS.; 9 Ves. jun. 509; Cooke v. Cooke, 2 Atk. 67. Vide supra, ch. 4.

<sup>(</sup>q) Whitchurch v. Whitchurch, 2 P. Wms. 236; 9 Mod. 124; Gilb. Eq. Rep. 168; and see 1 Bro. C. C. 170.

<sup>(</sup>r) 1 Bro. C. C. 6. 9.

reversion, which the purchaser could not get in(s). The facts, as stated in Lord Thurlow's judgment, on the rehearing, reported in Brown, are shortly these: Mrs. Rudger was seised in fee of the estate, subject to two terms of years, upon which it should seem small rents were reserved; which terms were vested in trustees in trust for Mrs. Rudger for life, and for raising certain annual and gross sums of money. Sir Andrew Chadwick purchased of Mrs. Rudger the fee-simple estate, and so much of the terms as related to it; and the trustees executed their power by granting a derivative lease to trustees for Sir Andrew, with a nominal reversion (eleven days) to themselves. Lord Thurlow admitted, that Sir Andrew meant to purchase the whole interest, and that his intent was, that the terms should attend the inheritance. If they did attend the inheritance in this case, it must, he said, be by implication of law, as there was no express declaration; and, after showing that the case of Whitchurch v. Whitchurch(t) did not apply to the case before him, because that there no interest was outstanding, except in form, he added, "Sir Andrew Chadwick might have given these terms to a stranger, and if the inheritance descended, the heir at law might demand the rents reserved by the leases. It is said to be extremely plain, that Sir Andrew Chadwick meant to consolidate (\*)the interests: this is begging the question. It is true he meant to take the largest interest he could, but by no means apparent that he meant to consolidate the interests. I lay no stress on the days of the reversion, for it was meant only as a nominal reversion; they did not mean to reserve a substantial interest. It would be necessary there should be an express trust to make this attendant on the

<sup>(</sup>s) See Capel v. Girdler, MS. and 9 Ves. jun. 509; 1 Cruise's Dig. 513, s. 17, and the marginal abstract of the case in Brown.

<sup>(</sup>t) Supra.

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inheritance; the transaction does not supply a necessary construction of law. It is a very nice point, and a very new one; whether the intent to purchase the whole interest is sufficient to make the term attendant on the inheritance. The impossibility he was under of purchasing the whole, rendered an express declaration necessary to make it attend the inheritance." Now, at first sight, it certainly does seem impossible to reconcile those parts of the judgment which are printed in italics. But it appears by an opinion of Mr. Fearne's (u), in consequence of which the cause was reheard, that rents were reserved by the leases granted by the trustees to Sir Andrew Chadwick, and the usual covenants were entered into by him, and the trustees were restrained to that mode of making a title by their trust, which required a reservation of rent. and the usual covenants.

This fact at once reconciles every part of the judgment. Lord Thurlow was of opinion, that the reversion of itself was immaterial, but that the rents reserved by the leases rendered an express declaration necessary to make the terms attend the inheritance. And Mr. Fearne was also of opinion, that the terms would not be attendant, if there was any intervening beneficial interest in any third person, to divide the ownership of the term from the inheritance. But as he was told that the rents reserved to the trustees upon the terms were afterwards purchased by Sir Andrew, (\*)he thought the terms did attend the inheritance, although there was not any express declaration for that purpose; and he expressly delivered his opinion, subject to this fact, which he had learned from verbal information only. By Lord Thurlow's decree on the rehearing, it appears clearly that the rents were not purchased, and conquently Mr. Fearne was misinformed in this respect.

Mr. Fearne's opinion on this point is very strongly

<sup>(</sup>u) 2 Collect. Jurid. 297. No. 6.

marked; for he thought, that if there was any intervening outstanding interest between the ownership of the term and the inheritance, even an express declaration of trust could not make the terms attendant. This, however, was going too far; and Lord Thurlow, who had probably seen this opinion, addressing himself to the cases in which a term would attend the inheritance, said, that might be by two ways: first, by express declaration; and then, whether the term would or would not merge, and whether the reversion be real or only nominal, it must be attendant on the inheritance.

We have seen that where a term attends the inheritance without any express declaration, it is by implication of law; and this implication, like all implications of law, or equitable presumptions, may be rebutted by even a parol declaration of the person in whose favor the implication or presumption is made(x).

VII. A term for years attendant on the inheritance, whether by express declaration or by implication, is governed by the same rules as the inheritance itself is subject to. Therefore it will not be forfeited by the felony of the owner of the inheritance (y); but if the inheritance escheat, the term will go with it(z).

(\*)So it seems, that such a term cannot pass by a will not executed according to the statute of frauds(a). But it appears to have been thought, and the distinction, it is conceived, may be supported on solid grounds, that where a term attends the inheritance merely by operation of law,

<sup>(</sup>x) See post. ch. 15.

<sup>(</sup>y) Attorney-general v. Sands, 3 Cha. Rep. 19; Hard. 488.

<sup>(</sup>z) Thruxton v. Attorney-general, 1 Vern. 340, 357.

<sup>(</sup>a) Tiffin v. Tiffin, 2 Cha. Ca. p. 49, 55; 2 Freem. 66; Whitchurch v. Whitchurch, Gilb. Eq. Rep. 168; Villiers v. Villiers, 2 Atk.
71. Note, Nourse v. Yarworth, Finch, 155, was before the statute of frauds.

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the owner may expressly bequeath it by a will not executed with the solemnities required by the statute(b).

It is clear, that where the devisor intended the inheritance to pass, but, by reason of the informality of the will, it descends to the heir, the term shall not go to the devisee, but shall follow the inheritance in its devolution on the heir(c).

So where a termor for years, having contracted for the fee, made his will, whereby, after reciting that he had purchased the term, and contracted for the fee, a conveyance of which could not then be obtained, he declared, that when a conveyance could be had, the estate should be settled to the uses mentioned in his will, and directed that the remainder of the term should remain and be attendant on the inheritance. The person who contracted to sell the fee was not owner of it, and the owner sold it to another person. Sir Joseph Jekyll held, that the testator intended to pass the inheritance; and although he had it not, yet the term could not pass by the will, as such a construction would be contrary to the testator's intention (d).

(\*) As the inheritance of an estate is not liable to simple contract debts, it follows, on the principle before noticed, that a term attendant on the inheritance is not personal assets for the payment of debts(e), but it is generally stated that such a term is real assets:—This is, however,

<sup>(</sup>b) See 9 Mod. 127; and see 2 Collect. Jurid. 276.

<sup>(</sup>c) Cases cited ante, n. (a).

<sup>(</sup>d) Bret v. Sawbridge, 3 Bro. P. C. 141, Tom. ed.; and see Fearne's Ex. Dev. by Powell, 145, n. (a). S. C. Appendix, No. 19. This note of the case will, I hope, be acceptable to the reader. It contains a concise statement of the facts, and sir Joseph Jekyll's judgment, which is, I believe, not in print, and comprises some interesting remarks on executory bequests of terms.

<sup>(</sup>e) Thruxton v. Attorney-general, 1 Vern. 340; Tiffin v. Tiffin, 1 Vern. 1.

a very incorrect expression: the term itself is not real assets, but is merely attendant on the inheritance, which is. In Chapman v. Bond(f), it appears to have been thought, that although the term was in a trustee, yet if it attended the inheritance by construction of equity only, it should be assets in equity for payment of the owner's debts, in like manner as a term taken in his own name would be assets at law. But this opinion is clearly overruled; and where a term is in a trustee, the same rules prevail on this point, whether the term be attendant by express declaration or not(g). In one case it is made a query, whether if tenant in tail contract debts by bond and die, and it can be made to appear that some of his ancestors, who bought the estate, found an old mortgage upon it for a long term of years, which was kept on foot to wait upon the freehold and inheritance, such lease in equity would not be assets in the hands of the heir in tail, for it is equity only makes such leases descend, and it is the highest equity, that a man's debts should be paid(h). There is not, however, the least foundation for this doubt. Equity, in this respect, follows the law, and at law the estate is not bound.

But where the inheritance is in trustees, and the owner has a term in his own name, and dies indebted, the term, although limited to attend the inheritance, will be liable (\*)to debts, for it is assets at law(i); and equity here follows the law(k), and therefore a purchaser should never

(f) 1 Vern. 188.

<sup>(</sup>g) Baden v. Earl of Pembroke, 2 Vern. 52, 213; 2 Trea. Eq. c. 4, s. 6.

<sup>(</sup>h) Anon. 11 Mod. p. 5.

<sup>(</sup>i) Thruxton v. Attorney-general, ubi sup.; Chapman v. Bond, 1 Vern. 188; Attorney-general v. Sands, Hard. 488.

<sup>(</sup>k) See 2 Cha. Ca. 49; Earl of Pembroke's case, 9 Mod. 125, cited.

<sup>(\*528)</sup> 

take the term in his own name, if he do not wish his estate to be personal assets.

If after the death of a person who has taken an assignment of a term in his own name, and a conveyance of the inheritance in the name of a trustee, his personal representative assign the term to attend the inheritance, it will cease to be assets at law; and the creditors or legatees will be entitled to satisfaction against the personal representative, as for a devastavit; and may, it should seem, even follow the term in equity, unless as against a bona fide purchaser without notice, against whom the term will not be severed or disannexed from the inheritance in favor of the creditors or legatees, although the purchaser did not take an assignment of the term, or was even not aware of its existence (l)(249).

But these distinctions will, as to persons who have died since the 29th August 1833, or who shall hereafter die seised of freehold, customaryhold or copyhold estates, in a great measure cease to exist; for the 3 & 4 W. 4, c. 104, has made all such estates assets for the payment of even simple contract debts.



(\*)SECTION III.

Of Attested Copies.

Thus have we taken a cursory view of the doctrine respecting terms of years, a learning which demands the practical conveyancer's peculiar attention; and we are

<sup>(1)</sup> Charlton v. Low, 3 P. Wms. 32.

<sup>(249)</sup> See The People v. Pleas, and Clark, 2 Johns. Cas. 376.

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now to consider in what cases a purchaser is entitled to attested copies of the title-deeds.

If a purchaser cannot obtain the title-deeds, he is, as we have already seen, entitled to attested copies of them at the expense of the vendor, unless there be an express stipulation to the contrary(m); and although he may not be entitled to the possession of the deeds, yet he has a right to inspect them, and the vendor must produce them for that purpose(n).

But a purchaser is not entitled to attested copies of instruments on record.

This was decided in the case of Campbell v. Campbell(o), where the Master, in taxing costs incurred by the sale of considerable estates, disallowed the charges for attested copies of deeds and documents upon record; and upon exceptions to his report on that account coming on, the Master of the Rolls over-ruled them, and held that a purchaser was not entitled to such copies at the expense of the vendor.

In some cases, however, a purchaser can obtain attested copies even of instruments on record. For a purchaser is entitled to examine the abstract with the original title-deeds, or with attested copies of them; and, therefore, if a vendor has not the instrument itself, and cannot (\*)obtain it, he is bound to procure an attested copy of it, to enable the purchaser to ascertain that the abstract is correct; and when it is obtained, the purchaser is of course entitled to it on the completion of the purchase; unless, indeed, the vendor retains other estates holden under the same title.

In a case before Lord Rosslyn, where there was an

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<sup>(</sup>m) Dare v. Tucker, 6 Ves. jun. 460; Berry v. Young, 2 Esp. Ca. 640, n.

<sup>(</sup>n) Berry v. Young, ubi sup.

<sup>(</sup>o) Rolls sittings after — Term, 1793, MS.

agreement that the vendor should produce the original title-deeds, his Lordship construed it, not only as an engagement to produce the title-deeds, but as a negative stipulation, that he should not give attested copies. This was certainly presuming a great deal. Lord Eldon has since thought that the pressure of the stamp duties led to that decision (p); and, it is probable, that a similar case would now receive a different determination.

In a recent case, Lord Eldon compelled the vendor, at his own expense, to furnish attested copies, the purchaser having had no intimation that he could not have the deed. For, his Lordship said, if he had notice that he was not to have them, he would regulate his bidding accordingly; conceiving that he was to bear the expense of procuring copies(q). From this, it may be inferred, that notice that the purchaser cannot have the deeds is tantamount to a stipulation, that he shall not be furnished with attested copies at the seller's expense. The general practice of the profession, founded on the decided cases, is, that the seller, in the absence of an express stipulation to the contrary, is bound, at his own expense, to furnish the purchaser with attested copies: and Lord Eldon does not appear to have intended to establish a new rule.

Where a purchaser cannot claim the title-deeds, it is of great importance to him to obtain attested copies of them. But attested copies are not of themselves sufficient security (\*)to a purchaser,—they are indeed mere waste paper against strangers, and cannot be used upon an ejectment, unless, perhaps, as between the parties themselves. Therefore, in order to enable a purchaser to effectually manifest and defend his title and possession, he is also entitled, at the expense of the vendor, to a covenant to produce the deeds themselves, at the expense of the pur-

<sup>(</sup>p) See 6 Ves. jun. 460.

<sup>(</sup>q) Boughton v. Jewell, 15 Ves. jun. 176.

chaser(r); which should, in most cases, be carried into effect by a separate deed. And where a vendor retains the deed by which the estate he is selling was conveyed to him (which is mostly the case when it relates to other estates), it seems advisable for the purchaser to require a memorandum of his purchase to be indorsed on such deed.

And where the title-deeds cannot be delivered, assignees must, like any other vendor, give attested copies of them at the expense of the estate, but their covenant for the production of the deeds should be confined to the time of their continuance as assignees(s). If, however, the covenant is so confined, the purchaser should have some security that the person who shall ultimately become entitled to the custody of the deeds will covenant for their production. The proper course seems to be for the assignees' covenant to be made determinable in case they shall procure the person to whom they shall deliver the deeds to enter into a similar covenant with the purchaser.

It may here be remarked, that although a purchaser of part of an estate has taken a covenant for the production of the deeds, yet, if they afterwards come into his possession by accident, no person can recover them from him who has not a better right to them than he has(t).

And if a purchaser without fraud leave the title-deeds (\*)in the hands of the seller, yet he may recover them in trover from the holder of them, although the latter may have advanced money upon them to the seller, and he is not bound to pay the money advanced (u).

Supposing a purchaser to be entitled to the custody of the deeds themselves, yet if any of them be lost, and the

<sup>(</sup>r) Berry v. Young, 2 Esp. Ca. 640, n.

<sup>(</sup>s) Per Lord Eldon, Ex parle Stuart, 2 Rose, 215.

<sup>(</sup>t) Yea v. Field, 2 T. Rep. 708.

<sup>(</sup>u) Harrington v. Price, 3 Barn. & Adolp. 170. (\*532)

vendor can deliver over copies which would be admitted as evidence at law, the purchaser will be compelled to take the title(w). But where a deed essential to the title is in the hands of a third person who is entitled to retain it, and would be compelled to produce it to the purchaser, the Court will not compel the purchaser to take the title unless the deed is deposited for the benefit of all parties(x). The purchaser is not bound to rely upon the equitable right to compel the production, but is entitled to the deeds, or a valid covenant to produce them(y).

It frequently happens, that a person having a covenant for production of the title-deeds to his estate, sells only part of the estate, and retains his purchase-deed, and the covenant to produce the deeds; and in such cases I should conceive the practice to be for the vendor to enter into the usual covenant for production of the title-deeds in his possession, which of course would include the original covenant to produce the deeds. But it seems that Mr. Fearne thought(z) that a purchaser was, in cases of this nature, entitled to require the vendor to covenant for the production of the deeds to such an extent as the covenant in the vendor's possession entitled him to the production (\*)thereof, unless he could procure a new covenant for that purpose from his grantors to the new purchaser; but that such covenant from the vendor should not be enforced, in case he produce the original covenant to produce the deeds, when it should be required to defend the purchaser's title.

<sup>(</sup>w) Harvey v. Phillips, 2 Atk. 541. See an opinion of Mr. Booth's 2 Ca. and Opin. 223. As to the cases in which the execution of an instrument will be presumed, see Skipwith v. Shirley, 11 Ves. jun. 64; Ward v. Garnons, 17 Ves. jun. 134; and see Holmes v. Ailsbie, 1 Madd. 551.

<sup>(</sup>x) Shore v. Collett, Coop. 234.

<sup>(</sup>y) Barclay v. Raine, 1 Sim. & Stu. 449.

<sup>(</sup>z) Posth. 113.

It is not unusual to insert a proviso in a deed of covenant, to produce title-deeds for determining the covenant, in case the vendor sell the part of the estate retained by him, and procure the person to whom the estate is sold, and the title-deeds are delivered, to enter into a similar covenant with the first purchaser, for production of the title-deeds.

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#### SECTION IV.

# Of Covenants for Title.

Let us now proceed to consider what covenants for title a purchaser is entitled to.

The covenants usually entered into by a vendor seised in fee, are, 1st, that he is seised in fee; 2dly, that he has power to convey; 3dly, for quiet enjoyment by the purchaser, his heirs and assigns; 4thly, that the estate is free from incumbrances; and lastly, for further assurance(a).

Where a vendor has only a power of appointment, the first covenant ought to be, that the power was well created, and is subsisting; and the other covenants should be similar to those entered into by a grantor seised in fee. In small purchases the first covenant is sometimes omitted, which may be safely done, for the first and second are synonymous covenants.

(\*)It sometimes happens, that a purchaser consents to take a defective title, relying for his security on the vendor's covenants. Mr. Butler remarks, that where this is

<sup>(</sup>a) See post. ch. 13. (\*534)

the case, the agreement of the parties should be particularly mentioned, as it has been argued, that as the defect in question is known, it must be understood to have been the agreement of the purchaser to take the title subject to it, and that the covenants for the title should not extend to warrant it against this particular defect(b)(250).

(b) See Butler's n. (1) to Co. Litt. 384 a. See also Savage v. Whitbread, 3 Cha. Rep. 14.

(250) Every right to, or interest in the land granted, to the diminution of the value of the land, but consistent with the passing of the fee of it by the conveyance, must be deemed in law an incumbrance. We say consistent with the passing of the fee of the land by the conveyance, because if nothing passed by the deed, the grantee cannot hold the estate under the grantor. Thus a right to an easement of any kind in the land is an incumbrance. So is a mortgage. So also is a claim of dower, which may partially defeat the plaintiff's title, by taking a freehold in one third out of it. And for the same reason a paramount right which may wholly defeat the plaintiffs title is an incumbrance. It is a weight on his land, which must lessen the value of it. Conformably to these principles thus laid down by the Chief Justice, it was held in Prescott v. Trueman, 4 Mass. 627, where the defendant covenanted that the lands sold in fee were free from all incumbrances; and the plaintiff sued for covenant broken, that a paramount right was an incumbrance. There, the defendant being seized of the lands in question, which seisin he acquired by a conveyance from J. S., who was in by disseisin. The breach alleged was that the heirs of the disseisee had, at the time when the deed was executed, a paramount right to said lands. If the plaintiff, the grantee, observed the Chief Justice, has not extinguished the paramount right, but it still remains against his title, he shall recover nominal damages only. Neither shall the grantor, the defendant, after having once paid the value of the land, be afterwards called on by the plaintiff on a subsequent eviction. If the plaintiff has at a just and reasonable price, extinguished that title, so that it can never afterwards prejudice the grantor, the jury, who may enquire of the damages, will consider this price as the measure of damages.

Here, the covenant of seizin is not broken, for it is admitted that the grantor was seized: neither is the covenant of a right to convey, broken, for a man seized has a right to convey: and on the warranty there is no remedy, until after eviction.

The covenant that the grantor has good right to convey an indefeasi-

And it may be further observed, that in cases of this nature, unless the objection to the title appear on the face of the conveyance, the agreement to indemnify against the defect, and the covenants to guard against it, should be entered into by a separate instrument.

With respect to the *persons* against whose acts a vendor is bound to covenant, it seems that,

1st. A vendor who actually purchased the estate himself, for money, or other valuable consideration, and obtained proper covenants for the title, is not bound to enter into covenants extending beyond his own acts(c). This, Mr. Fearne remarks(d), is a practice founded in reason, where the vendee obtains the full benefit of all the covenants in the conveyance to the vendor, to the same extent as his vendor has them, by obtaining the possession of the deeds containing those covenants. When the vendor has parted with his means of claim or remedy against his grantor for breach of his covenants, and transferred them to the purchaser, by delivery of the deeds, and such vendee comes into the vendor's place, in that respect, by the acquisition of such deeds, it would be unreasonable that the vendor should make himself liable (\*) for any such breach. He, by departing with the means

ble estate in fee, but nominal damages could be given, until the estate conveyed had been defeated, or the right to defeat it had been extinguished. But this covenant is not usually in our deeds of conveyance.

The same principle was recognized in Funk v. Voneida, 11 S. & R. 109, where the court held the mortgage was a subsisting incumbrance although the money was not due; and the plaintiff was entitled to nominal damages. And that the grantee if he chose might pay off the mortgage, and then he might recover the price it cost him. The existence of the incumbrance is the breach of covenant.

<sup>(</sup>c) See 2 Bos. & Pull. 22; and see two opins. in 3 Pow. Convey. 206, 210.

<sup>(</sup>d) Posth. 110.

of remedy or compensation, must be understood to have discharged himself from, and the vendee, by accepting those means, to have taken upon himself the peril or risk of, such breach, and the duty of enforcing its remedy or compensation.

2dly. Mr. Fearne, however, thought, that where a vendor retains the title-deeds, he is bound to enter into covenants extending to the acts of the persons against whose acts he is indemnified by the deeds in his possession(e): but he also thought these covenants should be qualified by the insertion of a covenant on the part of the purchaser, that in case any claim should be made under the vendor's covenants against the acts of the former owner, and he (the vendor) should produce the deeds, in order to enable the purchaser to avail himself of the covenants contained in them, then no advantage should be taken of the vendor's covenants.

This, however, is a distinction never attended to in practice: if a vendor is entitled to retain the deeds, he enters into the usual covenant for the production of them, but never enters into more extensive covenants for the title, on account of the retention of the deeds.

3dly. Where a vendor does not claim by purchase in the vulgar and confined acceptation of that  $\operatorname{word}(f)$ ; that is, by way of bargain and sale for money, or some other valuable consideration, a purchaser is entitled to require covenants from such vendor, extending to the acts of the last purchaser. For instance, if I sell an estate which was devised to me, and the devisor's father purchased the estate, the covenants for title are extended to the acts of the father(g)(251). And a person claiming under a

- (e) See the Lord Buckhurst's case, 1 Rep. 1.
- (f) See 2 Black. Comm. 241.
- (g) See acc. two opins. in 3 Pow. Conv. 206, 210.

<sup>(251)</sup> See 4 Munf. 144.

voluntary (\*) conveyance is considered in the same light as a devisee. So a person whose estate is sold under an order of a court of equity, or by a trustee to whom he has conveyed it upon trust to sell, is bound to covenant for the title in the same manner as he must have done if he himself had sold the estate.

But although the universal and settled practice of conveyancers is, to extend covenants for the title to the acts of the last purchaser, yet the Court of Chancery appears to hold, that a person not claiming by purchase is only bound to covenant against his own acts, and those of the person immediately preceding him(h). The rule established by practice is undoubtedly the most reasonable, for every purchaser is certainly entitled to a regular chain of covenants for the title. No solid reason can be given why any line should be drawn, and the covenants should extend to the person only who immediately preceded the vendor; and, however the Court of Chancery may act upon this rule, the practice of the Profession has taken too deep a root to be easily extirpated.

4thly. Where an estate is sold by trustees under a will, and the money is to be applied in payment of debts, &c. and the residue is given over, a purchaser is not entitled to any covenants for the title, because no line can well be drawn as to the quantum which would make a person liable to covenant; and therefore, if this rule were not settled, a person who only took 5l. might as well be required to covenant, as one who took a large sum(i)(252).

The same rule applies ex necessitate where an estate is sold for similar purposes under an order of a court of

<sup>(</sup>h) See 3 Atk. 267; 3 Ves. jun. 236; and see 14 Ves. 239.

<sup>(</sup>i) Wakeman v. Duchess of Rutland, 3 Ves. jun. 233, 504, affirmed in Dom. Proc. 8 Bro. P. C. 145; and see Lloyd v. Griffith, Atk. 264.

<sup>(252)</sup> See Grantland v. Wight, 5 Munf. 295. (\*536)

equity. If a different rule prevailed, the consequence (\*)would be, that the estate could never be sold by decree, till the account was taken of all the debts; because, before that account was taken, it could not appear who were to join in the conveyance, what was the number, and in what proportions they were beneficially entitled; but it is the constant practice to sell the estate in the first instance; of course the title can be made only by the trustees for sale, without calling in the parties who are presumptively beneficially interested(k).

In both these cases, therefore, the purchaser is only entitled to a covenant from the parties conveying, that they have done no act to incumber. But it is to be lamented, that in these instances also the rule of the Court of Chancery differs from the practice of the Profession; for it always has been, and still is, the practice of the Profession to make all the cestuis que trust, whose shares of the purchase-money are in anywise considerable, join in covenants for the title, according to their respective interests.

The rule of equity on this subject may of course be altered by the agreement of the parties(l); and therefore, in all agreements for purchase of estates from devisees, &c. in trust to sell, the purchaser should stipulate, that such of the persons entitled to the purchase-money as he may require, shall join in the usual covenants for the title. Where, however, the trust is to pay debts, or trifling legacies, which will exhaust the whole of the purchase-money, it is obvious that such a stipulation could not be carried into effect, and it had therefore better be omitted.

It must, however, be remarked, that the case of Wakeman v. Duchess of Rutland is by no means an authority that cestuis que trust of money to be produced by the sale

<sup>(</sup>k) See 3 Ves. Jun. 505, 506.

<sup>(1)</sup> See 3 Ves. Jun. 236.

of estates devised to trustees to sell, cannot in any instance (\*)be required to covenant for the title. Where the money to arise by sale of the estate is absolutely given to two or more persons, they are substantially owners of the estate, and must accordingly covenant for the title.

So, even where the money is in the first place to be applied in payment of debts, yet if they are all paid previously to the sale, the *cestuis que trust* must, it is conceived, covenant for the title.

Upon this case another observation occurs. Lord Rosslyn seemed to think it dangerous to make the cestuis que trust parties to the conveyance; he said, the prudence of the common clause, that the receipts of the trustees shall be a discharge to the purchaser, would be defeated, and the purchaser would take upon himself the knowledge of all the trusts of the will(m). If this be so, conveyancers are indeed reprehensible; but as the purchaser buys under the will, whether the cestuis que trust are or are not parties to the conveyance, he is equally affected with the knowledge of the trusts; and yet, as cujus est dare ejus est disponere, it cannot be supposed that equity would compel a purchaser to see to the application of the purchase-money, when the testator himself has declared he shall not. In Ewer v. Corbet(n), it was holden, that notice to a purchaser of a bequest of a term did not signify, as every person buying of an executor where he is named executor, necessarily must have such notice. This resolution applies to the point in question, and seems to place it beyond controversy.

Lastly, in conveyances by the Crown, a purchaser is not entitled to any covenants for the title; and where an estate is sold by assignees of a bankrupt, the purchaser is only entitled to a covenant from the assignees, that they have not done any act to incumber the estate.

<sup>(</sup>m) See 3 Ves. Jun. 235. (\*538)

(\*)But a bankrupt is always made a party to the conveyance of his estate, to prevent the difficulty which the purchaser might otherwise be put to in maintaining and proving the title; and the bankrupt is generally made to enter into covenants for the title in the same manner as he would have done, had he sold the estate while solvent.

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### SECTION V.

Of searching for Incumbrances.

It now comes in order to consider in what cases incumbrances should be searched for.

I. There are few cases in which judgments should not be searched for on the part of a purchaser; and if there is any reason to suspect the vendor, it is absolutely necessary to search immediately before the conveyance is executed, lest any judgments may have been entered up during the treaty; although if any judgments should be entered up after the purchase-money, being an adequate consideration, is actually paid, equity would relieve the purchaser against the judgments, notwithstanding that they were entered up previously to the execution of the conveyance; the vendor being, in equity, only a trustee for the purchaser, and a judgment being merely a general lien, and not a specific lien on the land: and this equity prevails, whether the judgment creditor had or had not notice of the contract(o)(I).

(o) See Nels. Ch. Rep. 184; Finch v. Earl of Winchelsea, 1 P. Wms. 278; 10 Mod. 418; 11 Vin. Ab. 118; and see Kennedy v. Daly, 1 Scho. & Lef. 373; Prior v. Penpraze, 4 Price, 99.

<sup>(</sup>I) See 9 Geo. 4, c. 35, as to judgments binding purchasers in Ireland.

(\*)In a case where a reversioner in fee first executed a bond, with a warrant of attorney to enter up judgment, and then mortgaged to another in fee, and on the 1st of January 1810 contracted to sell the estate to a purchaser without notice, and on the 5th of February 1810 a judgment was entered up and docketed, on the 28th of November 1812 an elegit issued, and an inquisition taken thereon on the 20th of January 1813, of which notice was given to the purchaser on the 16th of April 1810, but on the 15th of March 1810 the mortgagee in fee and the mortgagor had conveyed the estate in fee to the purchaser without notice, and a part of the purchase-money was secured to the seller by a legal term of years, and which was unpaid when notice of the judgment was given, and afterwards the purchaser paid off the mortgage, and took a surrender of the term(I), upon a bill filed by the judgment creditor, the Vice-Chancellor held, that as the greater part of the purchase-money was paid, and the rest secured by the term when the notice was given, the judgment creditor had no remedy in equity against the fee. The purchaser was then the mortgagor for the term. The notice therefore was nothing more than notice to the mortgagor that a person to whom he had granted a legal term, by way of mortgage, was indebted on judgment; but a judgment is, at law, no lien upon a legal term; and when the interest of the debtor is legal, a judgment is no lien in equity. Notwithstanding this judgment, the debtor could well assign his legal term at his pleasure. If there was no lien upon the term in the hands of the debtor, there could be no lien upon the term in the hands of his assignee (p).

<sup>(</sup>p) Forth v. The Duke of Norfolk, 4 Madd. 503. The case was heard upon appeal before Lord Eldon, who called for further papers. The parties agreed to be bound by his opinion.

This fact appears from the papers in the cause. (\*540)

(\*)It seems advisable to ask the vendor, or his attorney, whether there are any incumbrances which do not appear on the abstract; for if he answer in the negative, the search for judgments may be postponed until immediately before the execution of the conveyance; and if there are any judgments, and the purchase cannot be completed on that account, the purchaser can recover all his expenses from the vendor(q). It should seem, however, that the purchaser would equally be entitled to recover the expense of the conveyance, although he had not inquired after, or searched for, incumbrances before it was prepared, provided that he had examined the abstract with the deeds, and that the abstract did not disclose the incumbrances.

A purchaser who, at the time of his contract, is seised of the legal estate, as a mortgagee, need not search for judgments subsequently to the mortgage, for an equity of redemption is not within the clause of the statute of frauds, which will shortly come under our consideration; and it is, therefore, not extendable (r)(1)(253). And as the pur-

(q) Richards v. Barton, 1 Esp. Ca. 268; vide supra, ch. 4.

(r) Lyster v. Dolland, 1 Ves. jun. 431; 3 Bro. C. C. 478; and see Burdon v. Kennedy, 3 Atk. 739; Scott v. Scholey, 8 East, 467; Metcalf v. Scholey, 2 New Rep. 461.

<sup>(</sup>I) Note. An equity of redemption has been held to be assets under the statute of frauds, 2 Freem. 115, pl. 130; although the determination appears not to have been acted upon. It were much easier to maintain that an equity of redemption is extendible under the statute.

Note, the case of Freeman v. Taylor, 3 Keb. 307, was before the statute.

<sup>(253)</sup> See Punderson v. Brown, 1 Day, 93. Willington v. Gale, 7 Mass. Rep. 138. But in Massachusetts, an equity of redemption is made extendable by statute. In Pennsylvania, a judgment is a lien upon every kind of equitable interest in land, vested in the debtor at the time of the judgment. Curkhuff v. Anderson, 3 Binn. 4. But see Hurt v. Reeves, 5 Hayw. 53.

chaser will, by the contract, acquire equal equity with the judgment creditor, and has already got the legal estate, his title cannot be impeached. Some gentlemen of eminence even hold, that notice of judgments entered up subsequently to the mortgage will not affect the purchaser; but (\*)it is conceived, that if he purchase with notice, either express or implied, of any judgment, the legal estate will not protect him in equity against the judgment creditor. The judgment is a lien upon the estate in equity(s), and confers a right on the creditor to redeem a prior mortgage or other incumbrance (t)(254). And by the first principles of equity, a purchaser, with notice of any incumbrance, is bound by it in the same manner as the person was of whom he purchased (u)(255). And, indeed, it has been expressly decided, that a mortgagee, purchasing the equity of redemption, is bound by judgments of which he has notice, although they were entered up subsequently to the mortgage (x).

This doctrine prevailed before the statute of frauds, and has been the observed rule of equity ever since; and

- (s) Churchill v. Grove, Nels. Cha. Rep. 89; 1 Cha. Ca. 35.
- (t) See 2 Cha. Rep. 180.
- (u) See Anon. 2 Ventr. 361, No. 2.
- (x) Greswold v. Marsham, 2 Cha. Ca. 170; Crisp v. Heath, 7 Vin. Abr. 52, (E). pl. 2. Tunstall v. Trappes, 2 Sim. 286.

<sup>(254) &</sup>quot;A legal priority will be preserved in Chancery." Codwise v. Gelston, 10 Johns. Rep. 522. Per KENT. In Virginia, the lien of a judgment upon the lands of the party, relates back to the commencement of the term at which it was rendered. Mutual Ins. Soc. v. Stannard, 4 Munf. 539—542. See Winston v. Johnson's Exrs. 2 Munf. 305. But in North Carolina, a judgment is a lien upon lands only from the time it is pronounced. Den v. Hill, 1 Hayw. 72, 95. Or from the teste of the fi. fa. 1 Hayw. 99, 100.

<sup>(255)</sup> A verbal communication by a stranger to a purchaser, before he receives a conveyance, that a claim to the land exists, is sufficient notice to charge him with the equity of such claim. Currens v. Hart, Hardin, 37. And see Wadsworth v. Wendell, 5 Johns. Ch. Rep. 224. (\*542)

it is said, that previously to the statute of frauds, a judgment creditor was in like manner, and upon the same principles, relievable in equity against a conveyance to trustees. And by the tenth section of that statute it is enacted, that execution may be delivered upon any judgment, statute, or recognizance, of all such lands, &c. as any other person or persons shall be seised or possessed of in trust for him against whom execution is so sued, in the same manner as if he had been seised of such lands, &c. of such estate as they be seised of in trust for him at the time of the execution sued, and shall be held discharged of the incumbrances of the trustee. Upon the construction of this statute it hath been holden, that if a trustee has conveyed the lands before execution sued, though he was seised in trust for the defendant at the time of the (\*) judgment, the lands cannot be taken in execution (y). Now it is clear, that where the fee is in trustees, the purchaser would not be bound by any judgment, upon which no writ of execution had been sued, and of which he had not notice. But here, as in the preceding case, the purchaser, it is contended in practice, cannot be advised to rely on the legal estate in the trustees, where he has notice of any subsequent judgments. Mr. Powell(z), however, entertained a contrary opinion. After showing that trust-estates can only be taken in execution by virtue of the statute of frauds, he contends, that where the legal estate is in a trustee, notice to a purchaser of judgments is immaterial, because the lands are not liable at law; and, as equity follows the law, no relief would be granted against the purchaser, through the medium of a court of equity.

If the case of Hunt v. Coles be an authority, it must

<sup>(</sup>y) Hunt v. Coles, Com. 226. See Higgins v. The York Buildings Company, 2 Atk. 137; Harris v. Pugh, 4 Bingh. 335; 12 Moo. 577, S. C.

<sup>(</sup>z) 2 Mort. 4th edit. p. 608. vol. 1. 78

be acknowledged that trust-estates cannot be affected by any execution sued upon a judgment after the trustee has conveyed away the lands. But admitting, that before the statute of frauds, an incumbrancer might be relieved against a conveyance to trustees, it should seem to follow, that the same equity must still be administered. It were difficult to contend, that the statute has concluded the equitable relief. The registering acts expressly enact, that a purchaser shall not be bound by instruments, &c. unless they are registered, notwithstanding which equity will fasten on the conscience of a purchaser who bought with notice of any unregistered incumbrance; and there is surely greater reason to hold, that the jurisdiction of equity shall not be barred by a statute which merely (\*) gives a partial remedy at law without interfering with the equitable rights of the parties.

The difficulty in the way of the relief would be, that no case can be found, after the most diligent search, in which a judgment creditor has been relieved against a conveyance to trustees, where a purchaser had subsequently acquired the legal estate. The author formerly thought that equity would relieve against the purchaser, if he bought with notice; but his confidence in that opinion has been shaken by the want of authority in support of it. Nothing but a judicial determination can set the doubt on this point at rest(a).

The statute only extends to clear and simple trusts for the benefit of the debtor. Therefore a trustee of a term of years for securing an annuity, and subject thereto for the grantor, is not a trustee within the statute(b).

Where, however, an estate is conveyed to trustees upon trust to sell, and pay debts, &c. and to pay the surplus of the monies to arise by sale to the grantor, and the receipts

<sup>(</sup>a) See Steele v. Phillips, 1 Beatty, 193.

<sup>(</sup>b) Doe v. Greenhill, 4 Barn. & Ald. 684. (\*544)

of the trustees are made sufficient discharges to the purchasers; the better opinion is, that the purchaser is not bound by any subsequent judgments of which he has even express notice. Great difference of opinion has prevailed in the Profession on this point. Those who hold that a purchaser is bound by such judgments, rightly compare the interest of the grantor in the estate to an equity of redemption. But as such an interest is not extendible, the debt of the judgment creditor can only, it should seem, affect the suplus monies in the hands of the trustees, and is not a lien on the estate itself. When the receipts of the trustees are once made a discharge to the purchaser, there surely is not any equity in a subsequent (\*)incumbrancer to require the purchaser to see to the application of any part of the money. The creditor stands, as to his debt, in the place of his debtor, and consequently is entitled to have his debt discharged out of the surplus monies in the hands of the trustees; but he cannot, it is conceived, claim a higher equity; the contrary rule would be productive of infinite inconvenience.

In Lodge v. Lyseley(c), a father tenant for life and his son tenant in tail in remainder joined in conveying the estate to trustees to sell, and to pay 30,000l., part of the purchase-money, to the father, and the residue to the son. The trustees, whose receipts were made good discharges, contracted to sell the estate, and judgments were afterwards entered up against the father. The Vice Chancellor held that the purchaser could not be affected by the judgments. His Honor observed, that by the conveyance to which the father and son were parties, the son acquired a clear right in equity to have the trusts expressed in the conveyance performed, because he amalgamated his remainder in tail (which was converted into a fee by the recovery) with the father's life estate; and it was agreed

<sup>(</sup>c) 4 Sim. 70.

between them that there should be an immediate sale of the whole, and a division made of the purchase-money. Part was to be applied in payment of the father's debts, and 30,000l. was then to be paid to the father, and the clear residue was then to be paid to the sons; therefore as soon as the conveyance was executed the son had a clear right to file a bill against the father and the trustees for a sale, according to the trusts expressed; and inasmuch as part of the trust is, that the trustees should sell and give releases to the purchaser, there could be no execution of the trusts without allowing the trustees to receive the money and give their receipts, which were to (\*)discharge the purchasers. This case, he observed, bore no resemblance to the cases mentioned. The case that it most resembled was that which was submitted for Mr. Serjeant Hill's opinion(d). But even in that case he should not have given the opinion which the learned Searjeant did, because it appeared to him that from the time the party entered into binding contracts to sell his estates to purchasers, he not having judgments against him at that time, the purchasers had a right to file a bill against him, and have the legal estate conveyed, and if he had subsequently confessed a judgment, that judgment never could have impeded the progress of the legal estate to them. As to the case of Forth v. The Duke of Norfolk, no decision was given there on the point which might have arisen, because the chattel interest had ceased to have existence. His notion was, that it was of the essence of the trusts, which the son, as the purchaser, had a right to have performed, that the trustees should convey the legal estate, and give receipts for the purchase-money. His opinion was so clear, that he did not think that he ought to allow the purchaser to say that there was a doubt on the point.

<sup>(</sup>d) See the opinion in 4 Madd. 506, n. (\*546)

As a mortgagee seised or possessed of a legal estate need not search for judgments, so a purchaser, who obtains an assignment of a legal subsisting term of years in trust to attend the inheritance, may dispense with a search for judgments, &c. if he be assured that notice of any incumbrance cannot be proved on him or any of his agents. But as notice may be inferred from very slight circumstances, a purchaser cannot be advised in any case, or under any circumstances, to dispense with the usual searches. And even where he does rely on a term of years, yet if it be recently created, incumbrances (\*) should be searched for previously to the creation of the term.

It is, I believe, usual to search for judgments against a vendor, only from the time he purchased the estate; but this practice is not correct, because judgments bind after-purchased lands, and will consequently affect such lands even in the hands of a purchaser (e)(256).

(e) See Sir John de Moleyn's case, 30 E. 324 a; 1 Ro. Abr. S92, pl. 14, 16; 42 E. 3, 11 a; 42 Ass. pl. 17; 2 H. 4, 8 b. pl. 42; 14 a, pl. 5; 2 Ro. Abr. 472, (P.) pl. 3; Shep. Prac. Couns. 305; Hickford v. Machin, Winch, 84, per Jones, J.; and Brace v. Duchess of Marlborough, in 2d Resol. 2 P. Wms. 492.

<sup>(256)</sup> In Colhoun v. Snyder, 6 Binn. 138, Yeates, J. says, "The note subjoined to Sugden, has enumerated some other cases, none of which, upon inspection, will be found to warrant the doctrine in the extent laid down." He also said, that Sir John De Moleyn's case "not only does not support the inference of the abridgers, but is directly opposed thereto." p. 139. The decision in Colhoun v. Snyder, was upon the very point; and it was held, that judgments were not a lien upon after purchased lands, if aliened before execution. See Rundle v. Etwein, 6 Binn. 136. in note. But in New-York, a different rule has been adopted. "It cannot be doubted, that a judgment will attach on lands, of which the judgment debtor becomes seised at any time posterior to the judgment." Stow v. Tifft, 15 Johns. Rep. 464 Per Spencer, J. And an elder judgment is a lien upon lands, in the hands of the purchaser, sold under a ft. fa. issued upon a junior judgment. Ridge-(\*547)

Judgments do not bind leasehold estates till writs of execution are taken out upon them, and delivered to the sheriff(f). And yet, upon purchase of a leasehold estate, judgments must be searched for; because the sheriff will not permit his office to be searched for any writ of execution which may have been delivered there, lest the purposes of the writ should be defeated by the party against whom it is issued absconding, or removing his goods. Therefore, although the judgment will not of itself bind the leasehold estate, yet the purchaser cannot safely complete his contract, where he discovers a judgment, because he cannot be satisfied that an execution issued upon it has not been lodged with the sheriff. When we consider how many valuable leasehold estates are daily brought into the market, we shall perhaps think that the Legislature would do well to enact, that writs of execution intended to bind leasehold estates shall be docketed in like manner as judgments, and that where the estate lies in a register county, they shall be registered.

But old judgments existing against a former owner of (\*)a leasehold estate upon which it does not appear that execution issued, will not be considered an objection to a seller's title(g).

Where only an equity of redemption of a term is purchased, the purchaser will not be affected by even an execution lodged, of which he had not notice, for such an interest is not extendible under the statute of frauds, and certainly the mere delivery of the writ to the sheriff would not be implied notice to a purchaser(h).

<sup>(</sup>f) Vide post. Ch. 16.

<sup>(</sup>g) Causton v. Macklew, 2 Sim. 242; Williams v. Craddock, 4 Sim. 313.

<sup>(</sup>h) See 1 Ves. jun. 431; 3 Atk. 739.

ley's Exr. v. Gartrell, 3 Har. & M'Hen. 450. See Sanford v. Roosa, 12 Johns. Rep. 162.

<sup>(\*548)</sup> 

These observations, respecting judgments, must not be closed without observing, that if a person purchase part of an estate subject to a judgment, and the residue of the estate remain in the hands of the conusor, or descend to his heir, and execution is sued only against the original debtor or his heir, he shall not have contribution against the purchaser, and the consideration of the purchase is not material in these cases. But if execution be sued against the purchaser only, he shall have contribution against the person seised of the residue of the estate, whether they acquired it by descent or purchase(i).

Sir Edward Coke observes(j), that when it is said that if one purchaser be only extended for the whole debt, that he shall have contribution; it is not thereby intended that the others shall give or allow to him any thing by way of contribution; but it ought to be intended, that the party who is only extended for the whole, may, by audita querela, or scire facias, as the case requires, defeat the execution, and compel the conusor to (\*) sue execution of the whole land; so, in this manner, every one shall be contributory, hoc est, the land of every terre-tenant shall be equally extended.

II. To resume the consideration of the cases in which incumbrances should be searched for:

If the estate lie in a register county(I), the registrar's office should be searched, for the purpose of ascertaining not only that the estate is free from incumbrances, but also, that the title-deeds are duly registered;—the estate may be lost by neglecting to do so. And if it appear

<sup>(</sup>i) Sir William Herbert's case, 3 Co. 11 b. See the distinctions taken in Blakeston v. Martyn, 1 Jo. 90; and see Hartly v. O'Flaherty, 1 Beatty, 61.

<sup>(</sup>j) 3 Co. 14 b.

<sup>(</sup>I) For some observations on the registry acts, see infra, ch. 16.

that any deed has not been duly registered, the vendor must procure it to be registered at his own expense, previously to the completion of the contract; although, indeed, it sometimes happens that an instrument not being registered, prevents an objection being made to the title. To give an instance of this, let us suppose a man to have mortgaged his estate, and paid off the money, but to have neglected to take a re-conveyance. Now, in this case, if the mortgage was not registered, the purchaser need not insist upon its being registered, and require a re-conveyance from the mortgagee; because, as the deed was not registered, the morgagee did not acquire the legal estate, or if he did, would cease to have it by the registry of the conveyance to the purchaser; and, being paid off, he has of course no equity. So where a partial interest in an estate is devised to the heir at law, with a power of leasing, and he grant a lease not authorized by his power, the lease may, in some cases, be sustained both at law and in equity, in case the will was not registered according to the act. This, however, is a mode of making a title to which necessity only should compel us to resort.

(\*)It is very seldom that wills are registered; but a purchaser from a devisee should not complete his contract till the will is duly registered; for should any person purchase of the heir at law bona fide, and without notice of the will, and register his conveyance before the registry of the will, he would be preferred to the purchaser from the devisee(k).

But if the vendor be both heir at law and devisee, the non-registry of the will is immaterial; for if he sell to any subsequent purchaser, it must be either in the character of heir at law, or in the character of devisee. If he sell in this character, the second purchaser must have notice

<sup>(</sup>k) See Jolland v. Stainbridge, 3 Ves. jun. 478. (\*550)

of the will; if he contract in that, the first purchaser has already procured the legal estate.

So it seems clear, that if the vendor claim a leasehold estate, either as executor or legatee, the purchaser need not insist upon the testator's will being registered, because no subsequent purchaser can procure a title without notice of the will; and it may be remarked, that letters of administration are never registered, and they seem to stand upon the same principle as wills of leasehold estates.

If a purchaser be already seised of the legal estate, as if he be mortgagee in fee, and has contracted for the equity of redemption, it is not actually necessary to search the register if he be assured that notice cannot be proved either on himself, or on any one concerned for him; because the mere registration of deeds, as we shall hereafter see, is not notice to a purchaser seised of the legal estate previously to the purchase, and he will, therefore, be entitled to hold against any puisne incumbrance of which he had not notice.

Where the estate lies in the county of Middlesex, judgments need only be searched for at the registrar's office, (\*) as judgments bind estates in that county only from the time they are memorialized; but this is not the case in the county of York; for in the North Riding, any judgment registered within twenty days after the acknowledgment or signing of it, is available in the same manner as if it had been registered on the day it was acknowledged or signed(l); and in the East and West Ridings, and in Kingston-upon-Hull, thirty days are allowed for the registering of judgments(m). Therefore, where the estate lies in York, or Kingston-upon-Hull, recent judgments must be searched for in the proper courts.

It has already been observed, that judgments do not

<sup>(</sup>l) 8 Geo. II. c. 6, s. 33. (m) 5 Anne, c. 18, s. 11; 6 Anne, c. 35, s. 28. VOL. 1. 79 (\*551)

bind leasehold estates till delivery of a writ of execution to the sheriff. Writs of execution upon judgments intended to affect leasehold estates in a register county, were formerly never registered(n). From the present practice of registering writs of execution, it may perhaps be concluded that they ought to be registered; but the registry of them seems causus omissus out of the statutes for registry; and therefore, upon the purchase of a leasehold estate in a register county, not only the register, but also the proper courts, should be searched.

The register ought to be searched immediately before the execution of the conveyance, for the same reason that the search for judgments should be delayed till the last moment.

And lastly, since grants of annuities have become so prevalent, and can be searched for, it is the duty of the purchaser's solicitor to search for annuities. In a register county they need only be searched for at the registrar's office.

(\*)It may be useful to observe, that if a purchaser is damnified by his solicitor neglecting to search for incumbrances, it is clear that he may recover at law against the solicitor, for any loss occasioned by his negligence (o)(257). But an attorney's negligence cannot, perhaps, in any case, be set up as a defence to an action by him for the business done, although it should seem that if there is a cross-action by the client against the attorney, the Court will,

(n) Vide infra, ch. 16.

<sup>(</sup>o) Brooks v. Day, 2 Dick. 572; Forshall v. Coles, 7 Vin. Abr. 54,
pl. 6, MS.; and Appendix, No. 20; Green v. Jackson, Peake's Ca.
236; Ireson v. Pearman, 5 Dowl. & Ryl. 687. See Baikie v. Chandless, 3 Camp. Ca. 17.

<sup>(257)</sup> See Huntington v. Rumdell, 3 Day, 390. Smede's Exrs. v. Elmendorf, 3 Johns. Rep. 185. Dearborn v. Dearborn, 15 Mass. Rep. 316.

<sup>(\*552)</sup> 

upon application, stay the execution in the action by the attorney pending the other (p).

So if the chief clerk, whose duty it is to enter up and docket judgments, neglect to do so, by which a purchaser who has made the proper searches, sustains any loss, he, the purchaser, has a remedy against the clerk by an action on the case(q)(258). And any person who is damnified by the neglect of the registerar of either of the registering counties, may bring an action against him, in which he will recover treble damages and costs of suit, by virtue of the registering acts(I).

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### (\*) SECTION VI.

# Of Relief from Incumbrances.

Having considered in what instances incumbrances should be searched for, let us now inquire, 1st, In what cases a purchaser may detain the purchase-money, if incumbrances are discovered previously to the payment of it: and 2dly, To what relief he is entitled, if evicted after the money is actually paid; and these inquiries will involve the consideration of the cases in which a pur-

<sup>(</sup>p) Templer v. M'Lachlan, 2 New Rep. 136.

<sup>(</sup>q) Douglas v. Yallop, 2 Burr. 722.

<sup>(</sup>I) By the registering acts for Scotland, the remedy is extended against the heirs of the clerk, although no action shall have been commenced in the clerk's life-time. 1 Ersk, Inst. B. II. T. III. s. 42.

<sup>(258)</sup> See Russel v. Clayton, 3 Call, 41-43. Commonwealth v. Walbert, 6 Binn. 292. Work v. Hoofnagle, 1 Yeates, 506.

chaser will be relieved in respect of defects in the title to

I. First then, 1. Where an incumbrance is discovered previously to the execution of the conveyance, and payment of the purchase-money, the vendor must discharge it, whether he has or has not agreed to covenant against incumbrances, before he can compel payment of the purchase-money (r)(259).

2. But if a purchaser, before executing the articles, has notice of an incumbrance which is contingent, and it is by the articles agreed that the vendor shall covenant against incumbrances, the purchaser has entered into them with his eyes open, has chosen his own remedy, and equity will not assist him(s); and he cannot, therefore, detain

any part of the purchase-money.

(\*)II. 1. Although the purchaser has paid the money, yet if he is evicted before any conveyance is prepared and executed, or before the conveyance is executed by all the necessary parties, he may recover the purchase-money in an action for money had and received, although the intended covenants do not extend to the title under which the estate was recovered, and he may have taken possession of the estate(t)(I)(260).

- (r) Anon. 2 Freem. 106; Vane v. Lord Barnard, Gilb. Eq. Rep. 6;
  Serj. Maynard's case, 2 Freem. 1; 3 Swanst. 651; and see 1 Ves.
  88; 2 Ves. 394; 2 Ves. jun. 441; and 4 Bro. C. C. 394.
  - (s) Vane v. Lord Barnard, ubi sup.
- (t) Cripps v. Reade, 6 Term Rep. 606; Matthews v. Hollings, Woodfall's Law Land. 35, cited; Johnson v. Johnson, 3 Bos. & Pull. 162; and see Awbry v. Keen, 1 Vern. 472; and see Brig's case, Palm. 364; Simmons v. Hunt, 1 Marsh. 155; Jones v. Ryde, 5 Taunt. 488.

<sup>(</sup>I) In Robinson v. Anderton, Peake's Ca. 94, Lord Kenyon permitted a purchaser of fixtures in a house which were scheduled in the orig-

<sup>(259)</sup> See Witherspoon v. Anderson's Exrs. 3 Des. 246.

<sup>(260)</sup> See Judson v. Wass, 11 Johns. Rep. 525, 527. Clute v. Ro-(\*554)

2. But if the conveyance has been actually executed by all the necessary parties, and the purchaser is evicted by a title to which the covenants do not extend, he cannot recover the purchase-money either at law(u), or in equity(x)(261).

This was Serjeant Maynard's case(y). The plaintiff exhibited his bill to be repaid 600l. Sir Edward Moseley devised certain Leicestershire lands unto his wife, (afterwards Lady North,) for life, remainder to the first, second, third, fourth, fifth, and tenth son of his sister Maynard, (wife of Joseph Maynard, the Serjeant's eldest son,) in tail, remainder to Nicholas Moseley, the father of Oswald, for life, remainder to Oswald Moseley in tail,

inal lease, and belonged to the landlord, to recover the purchase-money, although the person who sold them was an under-tenant, and had himself ignorantly paid for the fixtures.

bisons, 2 Johns. Rep. 595. Gillet v. Maynard, 5 Johns. Rep. 85. Van Eps v. Corporation of Schenectady, 12 Johns. Rep. 436. Shearer v. Fowler, 7 Mass. Rep. 31. Ellis v. Hoskins, 14 Johns. Rep. 363. Caswell v. Black River Manufacturing Co. 14 Johns. Rep. 453.

(261) See Howes v. Barker, 3 Johns. Rep. 506. Abbott v. Allen, 2 Johns. Ch. Rep. 523. Frost v. Raymond, 2 Caines' Rep. 188. Abbott v. Allen, 2 Johns. Ch. Rep. 523. Per Kent. Gouverneur v. Elmendorf, 5 Johns. Ch. Rep. 79.

Where the vendor sells land with warranty, to hold from the death of the grantor, no action will lie to recover back the money paid. Thus, in Wallis v. Wallis, 4 Mass. 135, Parsons, C. J. said, 'The most that can be urged for the plaintiff is, that nothing passed by the deed, as it was intended to convey an estate in futuro; but he voluntarily paid his money, and took a covenant from the grantor, that after his death, the grantee and his heirs should have the land. But the plaintiff is mistaken in his construction of the deed; for by the covenant to stand seised to uses the conveyance can be effected.

<sup>(</sup>u) See Cripps v. Reade; Johnson v. Johnson; and Bree v. Holbech, Dougl. 654.

<sup>(</sup>x) Serjeant Maynard's case, 2 Freem. 1; 3 Swanst. 651; Anon. 2 Freem. 106.

<sup>(</sup>y) 3 Swanst. 651.

with other remainders over, and died in October 1665. The Serjeant goes down into Lancashire, peruses all the writings, (makes agreements with Mr. Edward Moseley, on behalf of his son, not to contest the will, and to discharge a lease for eleven years, and thereupon hath 10,000l. debt secured by judgment, all which agreements his son flies off from, and tries the will, &c.) and perceiving (\*)that if the will stood, (as he believed it would do, having examined all the witnesses upon the place,) then it would be in the power of my Lady North, by joining with Nicholas and Oswald, to bar all the contingent remainders to his daughter's children, who at that time had none, and so the Leicestershire lands, worth 600l. per annum, would be lost: In December 1665 comes to an agreement with Nicholas and Oswald to buy their remainder or possibility in the Leicestershire lands for 600l., and pays it down; and the manner of the further assurance was to be thus: Nicholas and Oswald were to procure the Lady North (without whom it could not be done) to join with them in a common recovery before the end of three years; and to secure this, Nicholas and Oswald gave a bond of 1,200l. to the Serjeant, conditioned, that if no recovery be suffered within three years, whereby the estates of Nicholas and Oswald may be sufficiently barred, then upon the re-conveyance of the premises to repay 600l. After this, Mrs. Ann Moseley sets up a title to the Leicestershire lands by virtue of a will of Sir Edward Moseley's father, found in loose sheets among the evidences, and supposed to be suppressed by the son, upon which title she exhibited a bill in this Court, and obtained a decree for the Leicestershire estate, notwithstanding which eviction the recovery was suffered within the three years by the Lady North and Nicholas and Oswald Moseley in due form; and now the Serjeant demanded the 600l. in equity, because no (\*555)

re-conveyance of the premises could be made within three years, in regard the title was evicted, and the recovery did him no good. But Lord Nottingham dismissed the bill.

Lord Nottingham, in delivering judgment, said that the cause which was heard before, and dismissed, came now to be re-heard at the plaintiff's importunity, who (\*)pressed earnestly for a decree, but he continued of the same opinion in substance, and caused the reasons of that opinion to be specially entered by the registrar in manner following: "His Lordship declared, that as this Court suffers no man to over-reach another, so it helps no man who hath over-reached himself without any practice or contrivance of his adversary; that it was most plain in this case there was no fraud nor concealment in the defendants at the time of the sale of their remainders, but all things were more open, and better known to the plaintiff than they were to the defendants, for the plaintiff had been upon the place and perused the evidence of the family, and the defendants did not solicit the plaintiff to buy, but the plaintiff importuned the defendants to sell their remainders, and had reason so to do, for otherwise, as things then appeared on all hands, the defendants, with the concurrence of the Lady North, might have disinherited the issue male to be begotten on Mrs. Maynard of all the Leicestershire estate, worth 600l. per annum. Accordingly the plaintiff covenants with the defendants for their title for 600l., which was much short of what it was then worth in all appearance, and the plaintiff draws his own assurance, and pens the defeasance of that bond, upon which he now sues in equity to have back the 600l. and interest, by which very bill the plaintiff admits that the defendants can no way be charged with the bond at law. It remains, ergo, to be considered what grounds there are to charge them in equity; for the

defendants, who made no corrupt or fraudulent agreement at first, insist upon it that they have literally performed that agreement which they made, and for which they took their money; ergo, that the defendants should now be forced in equity to pay back their money and interest, and be put into the same plight in effect as they would have been if they had broken their agreement, (\*) seems hard; and the more, because all the reasons which are used to enforce such a decree do arise either from the eviction by Mrs. Ann Moseley, or from the supposed defective and illusory performance of the agreement by the defendants, or from some other circumstance in the case which hath disabled the plaintiff to sue his bond at law; and yet no arguments are drawn from any of these heads strong enough to support this bill. For, first, as to the eviction; although after the bond and the agreements the lands were evicted by Mrs. Ann Moseley, so that the defendants may now seem to retain the 600l. for nothing, yet he that purchases lands with any other covenants or warranties against prior titles, as here, where the defendants sold only their own title, if the land be afterwards evicted by an eigne title, can never exhibit a bill in equity to have his purchase-money again, upon that account possibly there may be equity to stop the payment of such purchase-money as is behind, but never to recover what is paid; for the Chancery mends no man's bargain, though it sometimes mends his assurance; and it cannot be truly said that the defendants keep the money for nothing, since they have done all which was agreed to be done for it; but if the plaintiff had bought that which falls out to be worth nothing, he can complain of none but himself."

After discussing the manner of the defendants, performance of their agreement, the reasons of Lord Nottingham proceed thus: "For whereas the plaintiff supposes (\*557)

himself disabled to go to law, in regard the defendants are not obliged to repay without a re-conveyance, which cannot now be made in regard of Ann Moseley's eviction, his Lordship conceived this to be only a pretence; for whether the title be good or bad, the plaintiff may still proceed to re-convey what was pre-conveyed, and then assign the breach in not suffering a recovery if he think (\*)good. And the plaintiff might as reasonably have prayed a decree heretofore that the defendants might not perform their agreement, as pray a decree now that they may be never the better for it, if they have performed it. Wherefore, upon the whole matter, though, if the defendants had been plaintiffs for the money, his Lordship would hardly have decreed for them; as they were defendants, and in possession of money upon an agreement executed, his Lordship saw no cause to decree against them.

But yet he did not absolutely dismiss, but decreed, 1st, if plaintiff go to law, defendants to admit a reconveyance, and not to take advantage of eviction here; 2d, if plaintiff release defendants, to make further assurance.

So where (z) A. bought an estate, to one moiety of which there was a clear defect of title, which his counsel had overlooked, and he was afterwards evicted; he filed a bill asserting his claim to be repaid a moiety of the purchase-money, although the covenants for title did not extend to the eviction, but the bill was dismissed(I).

#### (z) See 3 Ves. jun. 235; and see 2 Bos. & Pull. 23.

VOL. I.

<sup>(</sup>I) In the second vol. of Coll. of Decis. p. 517, 518, a case to the same effect is reported.-Lands which were sold with the warrandice from fact and deed allenarly, being evicted, but not through default of the disposer, the purchaser brought an action, not upon the warrandice, which was not incurred, but upon this ground of equity, that if he has lost the land, he ought at least to have a repetition of the price. It was (\*558)80

The facts of this case were as follow: William Davy (\*)devised the estate in question to Sir Robert Ladbroke and Lyde Brown, as tenants in common, in fee; and gave all the residue of his real estate to his brother William Pate in fee. Sir Robert Ladbroke died in the testator's life-time. Robert Pate, as devisee of William Pate, the residuary devisee, conceived himself to be entitled to the moiety devised to Sir Robert Ladbroke, which became lapsed by his death, in the testator's life-time(I); and accordingly Robert Pate joined with the persons entitled to the moiety devised to Lyde Brown, in selling the estate to one Urmston. The conveyance recited the will of William Davy, and all the subsequent instruments, and a covenant was inserted for the title, notwithstanding any act done by Robert Pate, or his ancestors, or any person claiming under him or them. The purchaser finding Robert Pate had no title to the moiety over which he assumed a power of disposition, but that it had descended to the heir at law of William Davy, filed his bill, praying that the purchase-money might be restored to him. Robert Pate, the vendor, demurred to the bill for want of equity, and the demurrer was allowed(a).

(a) Urmston v. Pate, Chan. 1st Nov. 1794, cited in 1 Trea. Eq. 364, n. and stated in 4 Cruise's Digest, 90, s. 64.

answered, that when one sells with warrandice from fact and deed, the intention is not to sell the subject absolutely, which would be the same as selling it with absolute warrandice, but only to sell it so as the seller himself has it, that is to sell what title and interest he has in the subject: the purchaser takes upon himself all other hazards; and, therefore, if eviction happen otherwise than through the fact and deeds in the disponer, he bears the loss. The Lords assoilzed. Craig v. Hopkins.

<sup>(</sup>I) The mistake arose from the case of lapse being considered the same in regard to real and personal estate: in the case of personal estate lapsed legacies fall into the residue; but where a real estate lapses, it descends to the heir at law, and does not pass to the residuary devisee.

In a case where a purchaser bought and obtained a conveyance of an estate with all defects and faults of title, and the seller upon being interrogated, stated that no rent had ever been paid, which turned out to be false, and the title being merely a leasehold the estate was recovered by the lessor; upon an action by the purchaser to recover the purchase-money, it was left to the jury to (\*)say whether the seller really believed that no rent had ever been paid, in which case the learned Judge told them that the statement was not fraudulent, and he was not liable, and the jury found for the defendant. The Court refused to disturb the verdict. The statement, though false, in fact was not fraudulent. There was no distinction between an active and a passive communication, for a fraudulent concealment is as bad as a wilful misrepresentation. A fraudulent concealment by the seller of a fact which he ought to communicate, would undoubtedly vitiate the sale, but in order to have that effect the concealment must be fraudulent. The scienter or fraud is the gist of the action when there is not a warranty(b).

But it should be observed that in this case, as one of the Judges remarked, the purchaser bought the land with all faults and defects of title.

So, if a purchaser neglect to look into the title, it will be considered as his own folly, and he can have no relief. It has even been laid down, that if one sells another's estate without covenant or warranty for the enjoyment, it is at the peril of him who buys, because the thing being in the realty, he might have looked into the title, and there is no reason he should have an action by the law where he did not provide for himself(c)(262). But it may

<sup>(</sup>b) Early v. Garrett, 4 Mann. & Ryl. 687. As to defects in the quality of the estate, see p. 292.

<sup>(</sup>c) Roswell v. Vaughan, 2 Cro. 196; Lysney v. Selvy, 2 Lord Raym.

<sup>(262)</sup> See Bumpus v. Platner, Johns. Ch. Rep. 213. See also Stockton v. Cook, 3 Munf 68.

here be remarked, that by the 32 H. 8, c. 9, no person must either buy or sell any pretended title unless the seller or the persons from whom he claims have been in possession of the estate, or of the reversion thereof, or taken the rents thereof for a year before the sale, unless the purchaser is in lawful possession, in which case he may buy (\*)in any pretended right; and he will not in any case be affected, unless he bought with notice(c).

In a late case the statute was pleaded with effect(d). In a recent instance this statute was actually pleaded to a bill for a specific performance, on the ground that the plaintiff himself was only entitled under an agreement for purchase of the estate; but there was no foundation whatever for such a defence. It is perfectly clear that the statute does not apply to such a case. The sale is not of a pretended right or title, but of the estate in fee-simple in possession, subject certainly to the decision of a court of equity upon the right to a specific performance. There were lately similar cases in court, and one particularly of great magnitude, in which the sub-purchaser would have been happy to avail himself of any objection to get rid of the contract, but it never before occurred to any one to plead the statute. It might with equal force be argued, that a purchaser under an agreement has not a devisable interest, for it is settled, that a mere right of entry is not devisable; and this, it may be said, is "a mere pretended right or title." The clear doctrine is, that the purchaser, from the time of the contract, is in equity the owner of the estate, and may devise, sell and dispose of it in the same manner as if the fee were actually conveyed

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<sup>1118;</sup> Goodtitle v. Morgan, 1 Term Rep. 755; and see Anon. 2 Freem. 106; and see and consider Hitchcock v. Giddings, 4 Price, 135.

<sup>(</sup>c) See 4 Rep. 26 a; Bac. Abr. tit. Maintenance, (E.)

<sup>(</sup>d) Hitchins v. Lander, Coop. 34.

to him, although if equity ultimately refuse a specific performance, the devise, sale or other disposition necessarily falls to the ground. In a late case Lord Eldon reprobated the doctrine. His Lordship held clearly, that the sale of an equitable estate under a contract was binding. It was every day's practice. Upon a sale of an interest under a contract, the seller becomes a trustee (\*)for the second purchaser, and the second purchaser is, without entering into a covenant, bound to indemnify him against any costs incurred in proceedings for his benefit. The Court not only considers it not unlawful, but compels him to permit his name to be used for the benefit of the second purchaser(e). This puts the point at rest.

It is not champerty in an agreement to enable the *bona* fide purchaser of an estate to recover for rent due, or injuries done to it previously to the purchase (f).

"Where a purchaser has taken a defective title, and cannot recover against his immediate vendor, his only remedy is to have recourse to the covenants of the earlier vendors, many of which are inherent to the lands, and to some of which, as the covenant for quiet enjoyment, there is no objection, on account of their antiquity, where the breach is recent(g)."

3. It seems, that if the conveyance be actually executed, the purchaser can obtain no relief, although the money be only secured.

In an early case, however(h), where A had sold to B, with covenants only against A, and all claiming by, from, or under him, B secured the purchase-money; but before

<sup>(</sup>e) Wood v. Griffith, 12th Feb. 1818, MS.

<sup>(</sup>f) Williams v. Protheroe, 5 Bing. 309; 3 Yo. & Jerv. 129.

<sup>(</sup>g) Butler's n. (1). to Co. Litt. 384 a.

<sup>(</sup>h) Anon. 2 Cha. Ca. 19; and see Fonbl. n. (g) to 1 Trea. Eq. 361, 2d edition.

payment, the land was evicted by a title paramount to A.'s and Lord Chancellor Finch relieved from the payment of the purchase-money.

The case, it seems, was not taken by the reporter himself, and he adds the following notes or queries to it:

First. If declaration at the time of the purchase treated (\*)on, that there was an agreement to extend against all incumbrances, not only special, it could not have been admitted.

Secondly. The affirmative covenant is negative to what is not affirmed, and all one as if expressly declared that the vendor was not to warrant but against himself, and the vendee to pay, because absolute without condition.

Thirdly. Quære. If this may not be made use of to a general inconvenience, if the vendee, having all the writings, and purchase, is weary of the bargain, or in other respects sets up a title to a stranger by collusion?

Nota. In many cases it may be easily done, &c.

These remarks are unanswerable; and if the doctrine in this case were law, the consequences would be of a very serious nature; for what vendor would permit part of the purchase money to remain on mortgage of the estate, if he were liable to lose it, supposing the estate to be recovered by a person against whose acts he had not covenanted? Indeed, this point is so very differently considered in practice, that where part of the purchase-money is permitted to remain on mortgage, although the covenants from the vendor be limited, the vendee invariably enters into general unlimited covenants, in the same manner as he would have done in the case of an independent mortgage.

In a case(i) where an estate was sold before a Master under a decree, and the purchaser under the usual order had paid his purchase-money into the Bank, but it was

<sup>(</sup>i) Thomas v. Powell, 2 Cox, 394. (\*563)

not to be paid out without notice to him, and he took possession, and approved of the title, and the conveyance to him was executed by all necessary parties; afterwards, but before the money was paid out of the Bank, the tenants (\*)were served with a writ of right, at the suit of an adverse claimant; it was held that the money must be applied under the decree. The Court having given the purchaser possession of the estate which he had purchased, and a conveyance under a title which he himself had previously approved, had done all it could for the purchaser, who could not afterwards object to the application of the purchase-money.

But this does not apply to a sale under the Court, where the rent is misrepresented: although the money be paid into court and possession be delivered, and a conveyance executed, yet the Court will give to the purchaser out of the funds in Court, a compensation for the misrepresentation (k).

4thly. Although the purchase-money has been paid, and the conveyance is executed by all the parties, yet if the defect do not appear on the face of the title-deeds, and the vendor was aware of the defect, and concealed it from the purchaser, or suppressed the instrument by which the incumbrance was created, or on the face of which it appeared, he is in every such case guilty of a fraud(l)(263), and the purchaser may either bring an action on the case, or file his bill in equity for relief.

But, as Mr. Butler remarks, a judgment obtained after the death of the seller, in an action of this nature, can only charge his property as a simple contract debt, and will not, therefore, except under very particular circum-

<sup>(</sup>k) Cann v. Cann, 3 Sim. 447.

<sup>(1)</sup> See Harding v. Nelthorpe, Nels. Cha. Rep. 118; and Bree v. Holbech, Dougl. 654, 2d edit.; and see Freem. 2.

<sup>(263)</sup> See Dorsey v. Jackman, 1 Serg. & Rawle, 42. and ante, p. 23.

stances, charge his real assets. A bill in Chancery, in most cases, will be found a better remedy: it will lead to a better discovery of the concealment, and the circumstances (\*)attending it, and may in some cases enable the Court to create a trust in favor of the injured purchaser(m).

Where a bill is filed against the vendor, and the Court cannot satisfy itself of the fact, an issue will be directed to try whether the vendor did know of the incumbrance (n).

In a late case, where the sellers knew of a defect in the title to a part of the estate, which was material to the enjoyment of the rest, and did not disclose the fact to the purchaser, and it could not be collected from the abstract, the purchaser, although he was not evicted, was relieved against the purchase in equity. The sellers were decreed to repay the purchase-money, with costs, and likewise all expenses which the purchaser had been put to relative to the sale, together with an allowance for any money he laid out in repairs during the time he was in possession (o). This is a case of the first impression. But after the contract is executed by a conveyance and payment of the purchase-money, a bill cannot be filed merely for compensation (p).

Although the vendor has fraudulently concealed an incumbrance, yet the purchaser has no lien on the purchasemoney after it is appropriated by the vendor.

<sup>(</sup>m) See Butler's n. (1) to Co. Litt. 34 a.

<sup>(</sup>n) Harding v. Nelthorpe, ubi sup.

<sup>(</sup>o) Edwards v. M'Leay, Coop. 308; affirmed by Lord Eldon on appeal, 11 July 1818, with a reservation of the question as to repairs, MS.; S. C. 2 Swanst. 287. The question upon the right to rescind is fully considered, and all the authorities cited, in Mr. Younge's Report of Small v. Attwood.

<sup>(</sup>p) Lenham v. May, 13 Price, 749. (\*565)

Thus, in the case of Cator v. Earl of Pembroke(q), Lord Bolingbroke was tenant for life of a settled estate, with a power to sell and lay out the money arising by sale (\*) in other lands; and in the mean time to invest the same in the funds. Lord Bolingbroke granted life-annuities out of the estate, and then he and the trustees of the settlement sold the estate to Cator, who was ignorant of the annuities, and Lord B. covenanted that Cator should enjoy free from incumbrances. The purchase-money was invested in the funds in the names of the trustees, and Lord Bolingbroke granted annuities to Boldero the banker, to the extent of the dividends; and the trustees, at the request of Lord Bolingbroke, gave Boldero an irrevocable power of attorney to receive the dividends. Cator being evicted by the grantee of the annuities charged on the estate, filed his bill, insisting that he had a lien on the purchase-money invested in the funds, and was entitled to the dividends in exclusion of Boldero. The cause was first heard before the Lords Commissioners Loughborough, Ashhurst and Hotham, who thought that Cator had a lien on the dividends, but that Boldero had a preferable equity, and therefore dismissed the bill. The cause was reheard before Lord Thurlow(r), who affirmed the decree, and was moreover of opinion, that Cator could not follow the money when deposited with the trustees, but that having taken a covenant for quiet enjoyment and a good title, his remedy was that way.

Where a purchaser pays part of the purchase-money generally to a creditor of the vendor, by judgment, or other security affecting the land, and also by bond, or other security, which does not affect the land, it will be considered as a payment in satisfaction of the judg-

<sup>(</sup>q) Cator v. Earl of Pembroke, 1 Bro. C. C. 301; and see and consider 12 Ves. jun. 356. 377.

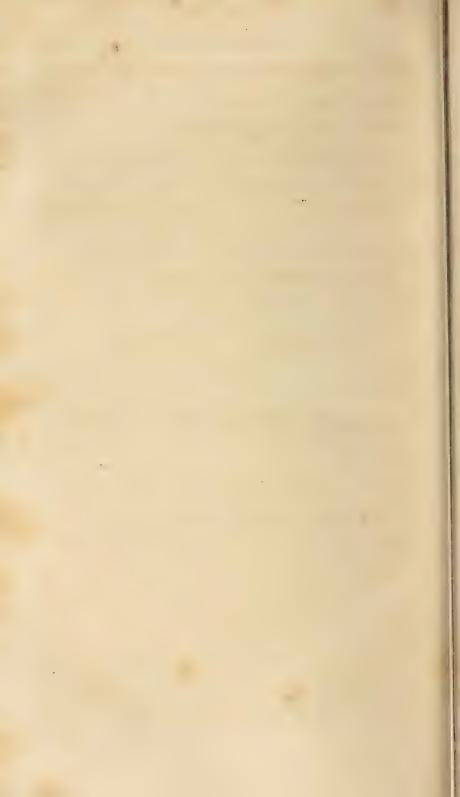
<sup>(</sup>r) 2 Bro. C. C. 282.

ment, or other incumbrance which charges the estate (s)(264).

- (\*) It may here be observed, that if a seller is bound to relieve the estate sold from incumbrances, and the purchaser buys them up, he ought not to charge more than he paid, as that is the amount of the damage which he sustains by the breach of the covenant to pay off the incumbraces (t)(265).
- (s) Brett v. Marsh, 1 Vern. 468. See Hayward v. Lomax, 1 Vern. 24; Peters v. Anderson, 5 Taunt. 596.
  - (t) 2 Dow. 296.
- (264) The question agitated in these cases, was, whether the party paying money has a right to direct the appropriation. See *Robert* v. *Garnie*, 3 Caines, 14. *Mayor of Alexandria* v. *Patten*, 4 Cranch, 317. *Field* v. *Holland*, 6 Cranch 8.
- (265) And if the purchaser agree to pay a certain sum, in discharge of an incumbrance, for which sum he is to have a credit in part of the purchase money; and it does not appear, that the vendor deceived him with respect to the sum, for which the removal of the incumbrance could be effected, he is not to be credited for any larger sum, which the incumbrancer may have compelled him to pay. Mayo v. Purcel, 3 Munf. 243.

(\*567)





### PRACTICAL TREATISE

OF

## THE LAW

OF

## VENDORS AND PURCHASERS

OF

# ESTATES.

#### By SIR EDWARD SUGDEN.

BONÆ FIDEI VENDITOREM, NEC COMMODORUM SPEM AUGERE, NEC INCOMMODORUM COGNITIONEM OBSCURARE OPORTET.

Valerius Maximus, 1, vii. c, 11.

FROM THE NINTH LONDON EDITION.

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## THE LAW

OF

## VENDORS AND PURCHASERS

OF

# ESTATES.

## CHAPTER X.

OF INTEREST AND COSTS.

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SECTION I.

Of Interest.

- I. Equity considers that which is agreed to be done, as actually performed; and a purchaser is therefore entitled to the profits of the estate from the time fixed upon for completing the contract, whether he does or does not take possession of the estate(a): and as, from that time, the money belongs to the vendor, the purchaser will be compelled to pay interest for it, if it be not paid at the day(b)(266).
  - (a) See 6 Ves. jun. 143, 352.
- (b) See Sir James Lowther v. the Countess Dowager of Andover, 1 Bro. C. C. 396, and see 6 Ves. jun. 352.

<sup>(266)</sup> See Hundley.v. Lyons, 5 Munf. 342. See also, Mayo v. Purcell, 3 Munf. 243. In the case of a purchase, the vendee has the pos-

The same rule applies to a sale of a reversion—interest must be paid from the time fixed upon for payment of the (\*)purchase-money, because the wearing of the lives is equivalent to taking the profits(c).

This is so plain a rule, that no disputes could ever arise on it, if the purchase-money were not frequently lying dead; in which case it becomes a question, whether the loss of interest shall fall on the vendor or purchaser.

If the delay in completing the contract be attributable to the purchaser, he will be obliged to pay interest on the purchase-money from the time the contract ought to have been carried into effect, although the purchase-money has been lying ready, and without interest being made of it(d).

But if the delay be occasioned by the default of the vendor, and the purchase-money has lain dead, the purchaser will not be obliged to pay interest(e)(267). The purchaser must, however, in general, give notice to the vendor that the money is lying dead(f); for otherwise there is

- (c) Davy v. Barber, 2 Atk. 490; and see Owen v. Davis, 1 Ves. 82; 3 Atk. 637; vide post as to the sale of a reversion before a Master.
  - (d) Calcraft v. Roebuck, 1 Ves. jun. 221.
  - (e) Howland v. Morris, 1 Cox, 59.
- (f) Calcraft v. Roebuck,  $ubi\ sup.$ ; and see Roberts v. Massey, 13 Ves. jun. 561.

session of the land, in lieu of interest; and therefore, if there be a condition to repurchase, it may be done on payment of principal only, unless interest be expressly mentioned; because, otherwise, the vendee would have double satisfaction; viz: interest and the use of the land. Thompson v. Davenport, 1 Wash. 127. Where the vendor is indebted to the vendee, and the sale is made in order to pay the debt, the vendor must pay interest from the time the debt is liquidated, until he makes a good title; and the vendee is accountable for the rents and profits from the time the title is perfected, until the contract is specifically enforced. Hepburn v. Dunlop, 1 Wheat. 179.

(267) See Wainright v. Read, 1 Des. 573. Wightman v. Reside, 2 Des. 578.

no equality: the one knows the estate is producing interest, the other does not know that the money does not produce interest(g). Wherever, therefore, a purchaser is delayed as to the title, and means to insist upon this, he ought to apprise the other party that he is making no interest. But even if a purchaser gave such notice, yet if it appears that the money was not actually and bona fide appropriated for the purchase, or that the purchaser derived the least advantage from it, or in any manner made use of it, the Court would compel him to pay interest.

In Winter v. Blades(h), the terms of the contract are (\*)not mentioned, but the other facts are thus stated: The bill in this cause was filed by the vendor of an estate, merely for the purpose of claiming interest on the purchase-money from the time the defendant, the purchaser, was let into possession. The purchase-money was 14,000l., and immediately upon entering into the contract, the purchaser called in a sum of money, secured by a mortgage, amounting to 12,400l., and upon entering into possession of the estate, gave notice to the vendor that he was ready to invest the purchase-money as he should direct, pending the investigation of the title. The vendor, hoping for an immediate conclusion of the purchase, did not answer that notice. The investigation of the title, however, occupied nine months. The banker of the defendant proved that during the nine months the balance of the defendant in his hands was never less than 14,000l., except during three successive days, when it was 13,876l.; and one other day, when it was 13,796l.

The Vice-Chancellor said, if after notice given by the defendant, he had made no profit of the purchase-money,

<sup>(</sup>g) Powell v. Martyr, 8 Ves. jun. 146. See Comer v. Walkley, post.

<sup>(</sup>h) 2 Sim. & Stu. 393.

then it would not be reasonable that he should be charged with interest. But that he has made some profit of the money, appears upon the defendant's own evidence; first, because his balance at his banker's was in a small degree and for a few days reduced below the amount of the purchase-money, but principally because the purchase-money supplied the place of that balance, which he must otherwise have maintained at his banker's. It was decreed that the Master should inquire what was the average balance which the defendant maintained at his banker's during the three years preceding the purchase, computing such balances at the end of every month; and the Master was also to inquire what was the average balance which during the time in question the defendant (\*)maintained at his banker's, computing such balance monthly; and the Master was to deduct what he should find to have been the defendant's average balance for the three years, from what he should find to have been the defendant's average balance during the time in question, and it was declared that to the amount of that difference the defendant was not chargeable with interest on his purchase-money.

If no time be limited for performance of the agreement, and the purchaser be let into possession of the estate, he must pay interest on the purchase-money from that time(i).

It cannot, however, be laid down as a general rule, that a purchaser of estates under a private agreement shall, from the time of taking possession, pay interest. At any rate, although the conveyance be executed, yet he shall not pay interest but from the time of taking possession, if prevented from so doing by the vendor(k). But it must be a strong case, and clearly made out, in which

<sup>(</sup>i) See ex parte Manning, 2 P. Wins. 410.

<sup>(</sup>k) Per Lord Hardwicke, in Blount v. Blount, 3 Atk. 636.

he shall not pay interest where he has received the rents and profits (l)(268).

Thus, in Comer v. Walkley(m), the purchaser had been in possession of the estate about twenty-two years, without any conveyance having been executed; and he had not paid the purchase-money. The delay was not attributable to him, and he stated that his money had been lying ready from the time of the contract, without interest being made by it, as he was in daily expectation of being called upon for payment of it; and therefore he insisted that he ought not to be compelled to pay interest. Lord Thurlow, however, decreed, that he should pay interest at four per cent. from the time he entered into possession (\*)to the time he paid the purchase-money into the Bank by the order of the Court.

And in a late case, where a particular day was appointed by the agreement for payment of the money, and the purchaser was to have a conveyance on payment of it, the purchaser entered before the conveyance was executed, and, after a delay of several years, during which he had received the rents, being called upon to pay the purchase-money, with interest, he resisted the demand of interest; and in answer to a bill filed against him, it was insisted that interest was not payable, as the money was to be paid on an event depending upon an act to be done by the vendor (namely, the execution of the conveyance) forming a condition precedent to the payment of the purchase-money. But Sir Wm. Grant, Master of the Rolls, after observing that the purchaser did not allege that any circumstances had occurred entitling him to relinquish the contract, said, that the act of taking possession was an

<sup>(</sup>l) See 8 Ves. jun. 148, 149.

<sup>(</sup>m) Reg. Lib. A. 1784, fo. 625; Smith v. Skelton, Reg. Lib. B. 1799, fol. 807.

implied agreement to pay interest; for so absurd an agreement as that the purchaser was to receive the rents and profits to which he had no legal title, and the vendor was not to have interest, as he had no legal title to the money, could never be implied(n)(269).

If it be agreed that the purchaser shall take possession of the estate, and pay interest on the purchase-money from that time, and it afterwards appear that a long time must elapse before a title can be made, the purchaser will be entitled to rescind the agreement.

But if the purchaser acquiesce in the delay until the contract is nearly carried into execution, he cannot then appropriate the purchase-money, and, by giving notice of that circumstance to the vendor, discharge himself from

the payment of interest.

(\*)Thus, in Dickenson v. Heron(o), after the execution of a contract for purchase of an estate, it appeared that an act of parliament was necessary to perfect the title, and that some time must elapse before a title could be made; and it was therefore agreed that the purchaser should take possession of the estate, and pay interest on the purchasermoney. Great delays having arisen, and the purchaser thinking exchequer bills, in which the purchasermoney was invested, not safe, he sold them, and gave notice to the vendor that the money was lying ready, and without interest being made of it. After the purchase was completed, and the money paid, the vendor filed a bill, asserting his right to interest until the execution of the conveyance.

The cause was heard before Sir Wm. Grant, Master of the Rolls, who pronounced the following judgment:—

(n) Fludyer v. Cocker, 12 Ves. jun. 25.

<sup>(</sup>o) Rolls, 16th March 1804, MS. See Fludyer v. Cocker, supra.

<sup>(269)</sup> See Boyle v. Rowund, 3 Des. 555.

<sup>(\*6)</sup> 

"An agreement of this nature is totally independent of the interest made by the money. When a purchaser is let into possession, the vendor need not mind what is done with the purchase-money, because the purchaser agrees to pay interest for the money. And such an agreement can only be affected by great delay, because the purchaser is not to be kept for ever bound by a disadvantageous bargain; for the interest might be better than the rents; in which case, if the purchaser was to be bound, notwithstanding an unreasonable delay, the vendor would not mind how long he delayed making a title. If the objection had been taken at a different time it would have been better. He should have made the objection when he knew that an act of parliament was necessary, as he was not before in possession of that fact. But he waved this delay, and he consents to continue to pay interest, and writes a letter which clearly implies that; or he (\*)might have waved the agreement. Afterwards he thinks he is entitled to say that he will not pay interest. The ground was totally distinct. He had laid out his money in exchequer bills, and then, upon a supposition that they were not safe, he sold out, and then gave notice that he would not pay interest. He ought certainly to have given notice before he sold out, and to have given the vendor his option, whether he would choose them to remain at his risk, or would wave his interest. This ground was, however, nothing to the vendor, as he had nothing to do with the interest. The only ground upon which he could have waved the agreement, was the delay in the first instance. The defendant mistook his case; he might have come at an earlier period, and insisted not to pay interest; for a Court would not have held him to an indefinite period. Besides, the notice was not given until a long delay could not take place." And the Master of the Rolls for these reasons decreed the purchaser to pay interest; VOL. II.

but, as he bound himself by his long acquiescence, his Honor would not give costs, and interest was only given up to the time the conveyance was delivered to the vendor's attorney for execution, although it was not executed until three months afterwards.

Where it was stipulated that the purchaser was to pay a deposit of twenty-five per cent., and in case of delay five per cent. interest on the purchase-money unpaid, and that the auction-duty was to be borne equally by the vendor and purchaser, the deposit was paid by the purchaser, but he did not pay any part of the auction-duty, and the Court compelled him to pay interest on half of the amount of the auction-duty at five per cent., on the ground that the sum paid into the hands of the auctioneer by the purchaser had been less by the moiety of the auction-duty than it ought to have been; and the circumstance that (\*)the auctioneer had applied the deposit in payment of the auction-duty was considered as of no weight (p).

In the case of timber on an estate to be taken at a valuation, interest on the purchase-money will only commence from the valuation, although the interest on the purchase-money for the estate itself may be carried a great way back, because surveyors always value timber according to its present state; and the augmented value of the timber by growth, is an equivalent for the interest from the time of the contract to the making of the valuation(q). But this, which was a good reason during the war, will not in all times justify the withholding of interest. Many cases have occurred in which the augmented value by growth between the time of entering into the contract and the completion of it, has not been equal to the depreciation in the market price of the timber during the same period.

(\*8)

<sup>(</sup>p) Townshend v. Townshend, 2 Russ. 303.

<sup>(</sup>q) Waldron v. Forester, Excheq. June 30, 1807, MS. Vide infra.

Upon the sale of an estate in possession, under the order of a court of equity, the rule is, that the purchaser is entitled to the possession or rents from the quarter-day preceding his purchase, paying his money before the following one(r).

Where a reversion is sold under the order of a court of equity, interest must be paid from the time of his purchase(s). And the same rule applies to an annuity, from which time only the purchaser is entitled to receive the annuity(t).

(\*) Formerly the practice seems to have been, where estates for life dropped in between a person being reported the best purchaser, before a master, and his taking possession, to direct the purchaser to make some compensation in consideration of the estate being bettered, or otherwise to go before a master again, and the estate to be put up for a new bidding(u), but the rule is now settled as above stated, and the purchaser, from the time the report is or might be confirmed, is entitled to any benefit by the dropping of lives, or the like.

In Kenny v. Wrenham, a life-annuity was sold on the 18th of April 1818, for 280l. to be paid by instalments: 200l. in October 1818, and the residue on or before 1st January 1819. It was held that the purchaser was entitled to the annuity from the time of payment of the last, and not from that of the first instalment of the price(x).

If, subsequently to a written contract, an agreement be

<sup>(</sup>r) Supra, p. 61. See Mackzell v. Hunt, 2 Mad. 34, n.

<sup>(</sup>s) Ex parte Manning, 2 P. Wms. 412; Child v. Lord Abingdon, 1 Ves. jun. 94; Twigg v. Fifield, 13 Ves. jun. 517; but see Davy v. Barber, 2 Atk. 489; Blount v. Blount, 3 Atk. 636; Growsock v. Smith, 3 Anstr. 877; Trefusis v. Lord Clinton, 2 Sim. 359.

<sup>(</sup>t) Twigg v. Fifield, 13 Ves. jun. 517.

<sup>(</sup>u) Blount v. Blount, 3 Atk. 636. See Davy v. Barber, 2 Atk. 489.

<sup>(</sup>x) 6 Madd. 355.

made, that the purchaser shall pay interest on the purchase-money from a particular time, and the agreement is reduced into writing, but signed by the vendor only; yet, if the contract has been in part performed, the purchaser will be bound by the subsequent agreement(y).

If a purchaser make payments to a seller exceeding the interest due on the purchase-money, of course rests must be made, and the balance only will carry inte-

rest(z)(270).

Where a leasehold estate is sold, and possession is not delivered to the purchaser, if any delay occurs, as it would not be just to make the purchaser pay the whole purchase-money, after part of the term is elapsed, without his having derived any benefit from the estate, the Court will compel the vendor to pay a rent in respect of his (\*)occupation of the estate: and the purchaser to pay interest on the purchase-money during the delay(a).

If a tenant for years, at a rent, with an option to purchase the fee, declare his option, he is entitled to retain the rent from that time, and in lieu of it must be charged

with interest upon his purchase-money (b).

And where a purchaser has not been in possession of the estate, and the seller receives interest, he will be compelled to pay not only the rent which he has received, but that which without his wilful default he might have received(c).

In a late case, where the contract had been delayed upwards of fifteen years, by the default of the selber, who

- (y) Owen v. Davies, 1 Ves. 82.
- (z) Griffith v. Heaton, 1 Sim. & Stu. 271.
- (a) Dyer v. Hargrave, 10 Ves. jun. 505.
- (b) Townley v. Bedwell, 14 Ves 591.
- (c) Acland v. Gaisford, 2 Mer. 28; Wilson v. Clapham, MS.; 1 Jac. & Walk. 36, S. C.

<sup>(270)</sup> See Connecticut v. Jackson, 1 Johns. Ch. Rep. 13, 17. Stoughton v. Lynch, 2 Johns. Ch. Rep. 202. (\*10)

had received one third of the purchase-money, and also all the rents of the estate, Sir Thomas Plumer, Master of the Rolls, compelled the seller to account not only for the rents, but for interest at four per cent. upon one third of them(d).

Where, however, interest is more in amount than the rents and profits, and it is clearly made out that the delay was occasioned by the vendor, to give effect to the general rule would be to enable the vendor to profit by his own wrong; and the Court therefore gives the vendor no interest, but leaves him in possession of the interim rents and profits(e); and therefore where a good title is not shown until a given period, the purchaser will pay interest only from that period, and he will of course take the rents from the same time.

(\*)But where there is an express stipulation, that if the conveyance is not executed, and the purchase-money paid by the day named, interest shall be paid until the purchase is completed, it has been held that the terms of that stipulation apply to every delay(f).

In the case of Monk v. Huskisson(g), however, the contract fixed a day for the conveyance to be executed, and provided that the Crown, on payment of the purchasemoney, should be entitled to the rents from that day. The contract then provided, "that if, by reason of any unforeseen or unavoidable obstacles, the conveyance cannot be prepared or perfected for execution on the day named, the Crown should pay interest for the purchase-money from that day (from which time His Majesty is to be

<sup>(</sup>d) Burton v. Todd, Todd v. Gee, 31 Mar. 1818, MS. Appendix, No. 21. See Lacon v. Mertins, 3 Atk. 1; 12 Ves. jun. 28; Wild v. Fort, 4 Taunt 334.

<sup>(</sup>e) Esdaile v. Stephenson, 1 Sim. & Stu. 122; Paton v. Rogers, 6 Madd. 256; Jones v. Mudd, 4 Russ. 118.

<sup>(</sup>f) S. C.

<sup>(</sup>g) 4 Russ. 121 n.

entitled to the rents and profits), after the rate of five per cent. per annum, until the completion of the assurances." The title was not made out until a much later period than the day named, and Sir John Leach, Master of the Rolls, gave the sellers interest only from the time when a good title was shown. Upon a re-argument, it was submitted that the express stipulation governed the case; but the Master of the Rolls held that the effect of the stipulation was not to give interest when interest would otherwise not have been payable, but to fix the rate of the interest to which the vendors might be entitled, at five per cent instead of four per cent. But in Oxenden v. Lord Exmouth(h), the condition was, that if from any cause whatever (except the wilful default of the vendor), the completion of the purchase made by any purchaser should be delayed beyond the 26th of December, the purchasers respectively so making delay should pay interest to the vendor, after the rate of five per cent., per annum from that time till the (\*)completion of the purchase, on the residue then unpaid of the purchase-money. The whole estate was sold by private contract. The purchaser, when the time appointed for completing the contract arrived, insisted that the contract was no longer binding, and took, besides, several objections. Thereupon the vendor filed a bill for a specific performance, and after a severe contest, in the Master's office, the Master reported in favor of the title, and that a good title was shown before the filing of the bill. Exceptions were taken both as to the title and the time of showing it. The former was over-ruled, but the latter allowed. But as the Vice-Chancellor considered that the suit was rendered necessary by the conduct of the purchaser, independently of title, he held that there was no wilful default within the meaning of the

<sup>(</sup>h) V. C. 13 Nov. 1833. MS.

<sup>(\*12)</sup> 

condition, and therefore that interest at five per cent. was payable from the day named.

In a case where a public-house was sold, with the goodwill and the licences, and the furniture, stock, &c. were to be taken at a valuation, and the purchase to be completed at a day named, but the seller continued to carry on the trade beyond that day, although the valuations were made, the purchaser objecting to the title: The purchaser was held bound to perform the contract; and the principle was followed up by charging the purchaser with interest on the purchase-money and valuation, and with the money expended in the business, and giving him the produce of the business, and the purchaser was to have the present stock in trade. But upon appeal, it was decided that the purchaser was not liable for the transactions of the trade, and was only to pay for so much of the original stock in trade as could be delivered to him, and was not bound to take the new stock; but the purchaser was charged with the rent, taxes, and other necessary outgoings of the premises since the time appointed (\*) for performance of the contract, with interest thereon, and he was refused an occupation-rent which he claimed from the seller(i).

The purchaser never pays interest on the deposit, although by his default the seller may have been prevented from receiving it from the auctioneer (k).

It frequently happens, that part of the purchase-money is left in the hands of the purchaser, for the purpose of paying off incumbrances at some distant period; and, in that case, the purchaser must pay interest for it to the vendor(l).

<sup>(</sup>i) Dakin v Cope, 2 Russ. 170.

<sup>(</sup>k) Bridges v. Robinson, 3 Mer. 694.

<sup>(</sup>l) Hughes v. Kearney, 1 Scho. & Lef. 132.

In Comer v. Walkley(m), it appeared, that a sum was left in the purchaser's hands, at interest, as an indemnity against an incumbrance. The purchaser afterwards paid part of the sum to the vendor; notwithstanding which, the purchaser and his devisees continued to pay interest on the whole for many years. A bill was at length filed to compel payment of the residue of the sum deposited; and the mistake being admitted, the Master was directed to take annual rests of the over-payments, and to compute interest thereon at five per cent., and the amount of the over-payment and interest to be deducted from the sum which would be found due from the purchaser.

Where a purchaser is entitled to recover at law a deposit paid by him to the vendor, he can also recover interest on it from the time it was paid, without an express

agreement.

But where he proceeds against the auctioneer to whom the deposit was paid, he cannot recover interest unless under particular circumstances; e. g. where, when the title was made out, if the auctioneer was called upon to (\*)pay it over, and refused, he might be liable from that time, or perhaps it was said, if he actually made interest of the deposit(n). An auctioneer ought not to be liable generally to interest: for an auctioneer is bound to keep a deposit till the execution of the contract, as a banker or depositary of it: for which reason it seems doubtful whether, if he actually made interest of it, he ought to be compelled to pay interest(o).

(m) Reg. Lib. A. 1784, fo. 625.

<sup>(</sup>n) Farquhar v. Farley, 7 Taunt. 592; Lee v. Munn, 8 Taunt. 45;
1 Moore, 481; Curling v. Shuttleworth, 6 Bing. 121; 3 Moo. & P. 368, S. C.

<sup>(</sup>o) See Lord Salisbury v. Wilkenson, 8 Ves. jun. 48; and 3 Bro. C. C. 43; 14 Ves. jun. 509, cited. See also Browne v. Southhouse, 3 Bro. C. C. 107; sed vide Willis v. the Commissioners of Appeals in Prize Causes, 5 East, 22. Gaby v. Driver, 2 Yo. & Jerv. 549.

The non-liability of the auctioneer was solemnly decided in Harrington v. Hoggart(p), although the seller, but without the concurrence of the purchaser, gave him notice to invest the deposit. Lord Tenterden, C. J., in delivering judgment, said, "there is an essential distinction between the character of an agent and that of a stakeholder. The case of Rogers v. Boehm(q) was the case of an agent: and what Lord Kenyon there said, must be understood to apply to a person filling that character. If an agent receive money for his principal, the very instant he receives it, it becomes the money of his principal. If, instead of paying it over to his principal, he thinks fit to retain it, and makes a profit of it, he may, under such circumstances as occurred in that case, be liable to account for the profit. Here the defendant is not a mere agent, but a stakeholder. A stakeholder does not receive the money for either party; he receives it for both; and until the event is known, it is his duty to keep it in his own hands. If he thinks fit to employ it, and make interest of it, by laying it out in the funds or otherwise, (\*) and any loss accrue, he must be answerable for that loss; and if he is to answer for the loss, it seems to me he has a right to any intermediate advantage which may arise. The defendant here has not laid out or made a profit of the plaintiff's money; for at the time he laid it out it was not the plaintiff's, and it was doubtful whether it would ever become so or not. Then there is in this case the special circumstance of the requisition by Sir John Harrington to the defendant, that he should lay out the money. The answer given to that was, "I will do it if Mr. Secretan, the purchaser, will consent;" which was saying, in effect, though not in words, "I am a stakeholder: I am answerable to Mr. Secretan for the money,

<sup>(</sup>p) 1 Barn & Adolph. 577.

<sup>(</sup>q) 2 Esp. 702.

or I may be in the result, and I cannot without his consent, therefore, do what you ask." Mr. Secretan's consent was never obtained. As to the offer of an indemnity, it was not insisted upon; and it could not well be insisted that any person is bound to take the indemnity of another. Therefore that special circumstance, in my opinion, does not take the case out of the general rule, or deprive the defendant of the character of a stakeholder, or of the advantages, if there be any, which belong to that character, nor exempt him from the obligations arising from it. As to the cases that have been cited upon this subject, there certainly is none in which interest has been recovered from an auctioneer. The strong inclination of Lord Eldon's opinion was, that it could not be recovered in this particular case, even although it should appear that a profit had been made. By deciding now, that the defendant is not liable, we certainly do not vary from any principle which has been laid down by a Judge in equity, or make the law in this Court different from the rule in equity. I have observed, that there is no case in which interest has been recovered against an auctioneer. There has been, as there may (\*) well be, a recovery of interest by the purchaser against the vendor, where the latter has not been able to complete his contract; but that has been as part of the damage which the purchaser sustained by the non-completion of the contract. Part of that damage is the loss of the use of that money, which in the mean time has been lying idle in the hands of the auctioneer. There may be cases also in which the vendor may have a right of action for damages against a purchaser who has failed to complete his contract. But there was no authority to show that an auctioneer is liable to pay interest on a deposit."

If interest be recovered against an auctioneer, and he (\*16)

himself be not in fault, he may recover it from the vendor(r).

And where the statute of limitations has run, and it is pleaded, but the auctioneer pays the deposit into court, he cannot be compelled to pay interest; although, but for the statute, the deposit would have carried interest, as the payment of the principal does not raise any implied promise to pay the interest(s).

And where the purchaser recovers the deposit only from the auctioneer, he may, in an action against the seller, recover interest on it, and the expenses of investigating the title, under an averment of special damage(t).

If a vendor cannot make a good title, and the purchaser's money has been lying ready, without interest being made by it, the vendor must pay interest to the purchaser(u).

(\*) Thus the law seemed to stand upon the decided cases, and the practice appeared to be conformable to it. But in consequence of some general rules as to interest, which were laid down by Lord Ellenborough in some cases at nisi prius, it was thought, by some, that interest could not be recovered in many cases in which it had formerly been obtained(x). These rules, however, were not intended to embrace every possible case; for it was not denied that interest may be recovered upon an implied contract for payment of it(y); and, accordingly, in a case before Lord Ellenborough at nisi prius, where the

<sup>(</sup>r) See Spurrier v. Elderton, 5 Esp. Ca. 1. Qu. if the case can arise after the decision in Harrington v. Hoggart.

<sup>(</sup>s) Collyer v. Willock, 4 Bingh. 313; 12 Moo. 557, S. C.

<sup>(</sup>t) Farquhar v. Farley, 7 Taunt. 592; 1 Moo. 322.

<sup>(</sup>u) Fleureau v. Thornhill, 2 Black. 1078.

<sup>(</sup>x) De Havilland v. Bowerbank; Crockford v. Winter, 1 Camp. Ca. 50, 124; De Bernales v. Fuller, 2 Camp. Ca. 426.

<sup>(</sup>y) Calton v. Bragg, 15 East, 213.

title was bad, and the purchaser, in his action for recovery of the deposit, declared specially, and alleged by way of special damage, that by reason of a good title not being made, he had lost and been deprived of the use of the money which he had deposited, according to the conditions of sale, Lord Ellenborough said, that they had lately held that interest was not recoverable on money lent, without some evidence of a contract for that purpose; but he thought that the plaintiff, in the case before him, ought to be allowed interest, as special damage from the day when the purchase ought to have been completed. He averred in his declaration, that by the defendant's breach of contract he had since lost the use of his money, and he had proved that averment. There seemed to be no reason, therefore, why this loss should not be compensated to him by the allowance of interest on his deposit, and the purchaser had a verdict accordingly(z)(271). This decision agrees with the general practice of the Profession, and has been since followed by (\*)the Court of Common Pleas(a); but yet Mansfield, C. J. ruled otherwise at nisi prius before the last decision; and in a later case at nisi prius, Lord Tenderden said, he did not know of any case of this kind in which interest had been allowed(b). The legal right to recover, therefore, is left in great doubt upon the authorities.

By a recent statute (c) it is enacted, that upon all debts or sums certain, payable at a certain time or otherwise, the jury on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, allow interest to

<sup>(</sup>z) De Bernales v. Wood, 3 Camp. Ca. 258.

<sup>(</sup>a) Farquhar v. Farley, 7 Taunt. 592; 1 Moo. 322.

<sup>(</sup>b) Bradshaw v. Bennett, 5 Carr. & Pay. 48.

<sup>(</sup>c) 3 & 4. W. 4, c. 42, s. 28.

<sup>(271)</sup> See Perit v. Wallis, 2 Dall. 252. See also, United States v. Gurney, 4 Cranch, 333. Lightfoot v. Price, 4 Hen. & Munf. 431. (\*18)

the creditor, at a rate not exceeding the current rate of interest, from the time when such debt or sums certain were payable, if such debt or sums be payable by virtue of some written instrument at a certain time; or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment, with a proviso, that interest shall be payable in all cases in which it is now payable by law.

Where the biddings before a master are opened, the purchaser will be allowed interest at the rate of 4 per cent. per annum, on such part of the purchase-monies as the Master shall find to have lain dead(d).

Where the purchaser pays into court a sum of money on account, and in part of the purchase-money, which is invested at the request of the vendor(e), it is the money of the vendor, who is to take the chance of the rise or fall of the stocks(f).

(\*) Where a purchase by a trustee is set aside, and the estate restored to the *cestui que trust*, the purchaser is allowed interest on the money paid by him, and is compelled to pay a rent for the estate during his enjoyment of it(g).

But where a sale is annulled on account of notice in the purchaser of a prior claim, and he is decreed to account for the rents, it seems that he shall not be charged with interest on the rents(h).

Where a purchase was set aside on the ground of fraud, and the purchaser was decreed to pay an occupation-rent,

- (d) This was directed on opening the biddings for General Birch's estate, MS.
  - (e) This fact does not appear in the Report. S. C. MS.
  - (f) Gell v. Watson, 2 Sim. & Stu. 402.
  - (g) Infra, ch. 14.
  - (h) Macartney v. Blackwood, Irish Term Rep. 602.

and to be repaid his purchase-money and interest, annual rents were directed, so that the excess of rent beyond the interest might go in reduction of the capital(i).

An agreement, that if the purchase-money be not paid at the time stipulated, the purchaser shall pay a rent for the estate, exceeding the legal interest of the money, is not usurious (k)(272).

- (i) Donovon v. Fricker, 1 Jack. 165.
- (k) Spurrier v. Mayoss, 1 Ves. jun. 527; 4 Bro. C. C. 28.

"(272) The subject of usury came under consideration in the late case of Dowdall v. Lenox, 2 Edw. Ch. R. 267, where one Nicoll applied to the defendant for a loan of \$60,000 in order to undertake a mercantile adventure; and the defendant made it a condition of the loan that \$4,500 part of a larger sum owing by Nicoll to the defendant; and which had been owing ever since his failure in business years before. And it was part of the agreement that both sums were to be included in a bond executed by Nicoll and Dowdall bearing interest. The property also was to be insured for the benefit of defendant; and the bill of lading and invoice to come home under cover to defendant: The V. Chan, held, that the transaction was not usurious. He admitted it to be a general rule—that where the transaction is substantially a loan upon an understanding that the money or thing lent is to be returned at all events, the lender cannot lawfully reserve or take to himself any thing in the shape of interest or profit beyond the amount of interest at the legal rate; and no shift or contrivance for this purpose will be allowed to take the case out of the statute. But he proceeded to observe that—" The exceptions to the rule embrace special and peculiar cases, as where, under some circumstances, the lender can charge commissions for transacting business: Nourse v. Prime, 7 J. Ch. R. 69; or where a mortgagee out of possession stipulates for the consignment of the produce of the estate mortgaged to be sold by him on commission: Bunbury v. Winter, 1 J. & W. 255: Sayers v. Whitfield, 1 Knapp's R.

Some of the most frequent instances of what are deemed shifts or contrivances to clude the statute are, where the loan is made in a depreciated currency or in bonds, notes or goods of a less value than their nominal amount, as in the Bank of the United States v. Owens, 2 Pet. R. 527;—or where the advance of money, although exhibiting all the characteristics of a loan, is made to assume the form of a purchase of a rent charge or an annuity payable out of lands and exceeding lawful

And an agreement to sell an estate for a principal sum, which, with interest added thereto after the rate of 6l. per cent. per annum, for the time the notes had to run, was secured by certain promissory notes according to the contract, was held not to be a usurious contract. The Lord Chief Justice said that the case arose out of a contract for the sale of an estate, and not for the loan of money. The agreement was founded partly upon what was considered the present price, if paid for at a future day. The only difficulty had been occasioned by calling the difference between these two prices interest; but it was their duty to look, not at the form and words, but at the substance of the transaction; and as on the one hand they should not pay attention

interest upon the sum advanced: Lloyd v. Scott, 4 Pet. R. 205. so, likewise, where the borrowing of money is accompanied by the grant of a lease by the borrower to the lender; the latter taking advantage of the necessities of the former, to obtain a lease at a rent less than the fair yearly value of the lands or upon more advantageous terms than he otherwise could have done at the same time reserving to himself full interest upon the money lent. Moore v. M'Kay, 1 Beat. R. 282; 2 Molloy's R. 134. In all the cases, the question seems to have been whether the substance of the transaction was really a loan of money or the creation of a debt, whatever might be the form of the contract; and if found to be so, then whether the lender or payee had stipulated for or secured to himself, by means of the loan and arising either from it or from any thing connected with it and forming a part of the same transaction, any profit or pecuniary advantage he would not otherwise have been entitled to exceeding the rate of interest allowed by law. That this is the test, appears likewise from the language of Judge Johnson in 2 Pet. 527 supra. He says, "a profit made or loss imposed on the necessities of the borrower, whatever form, shape, or disguise it may assume, where the treaty is for a loan and the capital is to be returned at all events, has always been adjudged to be so much profit taken upon a loan and to be a violation of those laws which limit the lender to a specified rate of interest." So, where, in connection with the loan of money and as part of the transaction, the lender sells to the borrower, while in embarrassed circumstances, bonds, goods or other things at a price exceeding their real value and includes the amount in the security for the loan: Eagleson v. Shotwell, i J. Ch. 535; Morgan v. Schermerhorn, 1 Paige, Ch. R. 544.

(\*)to the words of the contract if the substance of it went to defeat the provisions of the statute of the 12 Anne, c. 16, so on the other hand they ought not to rely upon the words so as to defeat the contract, if in substance the transaction was legal. It appeared to him, that in substance this was a contract for sale of the estate at the price of 20,800l. to be paid by instalments; in that there was no illegality; the defence set up therefore failed(l).

II. Where interest is recovered at law, it is always at the rate of 5 per cent.(m), but in equity the rate of interest allowed is 4 per cent.(n).

In Blount v. Blount(o), Lord Hardwicke said, the Court would give such interest as was agreeable to the nature of the land purchased; but this seems never to be taken into consideration, nor indeed ought it to be; interest being given not so much on account of the profits of the estate, as the unjust detention of the purchasemoney.

In Dickenson v. Heron(p), at the time the purchaser took possession of the estate, it was agreed he should pay interest on the purchase-money, but no rate was fixed. The purchase-money, however, then produced 5 per cent., and it was understood between the parties that interest

<sup>(</sup>l) Beete v. Bigwood, 7 Barn. & Cress. 453; 1 Mann. & Ryl. 143, S. C.

<sup>(</sup>m) See now 3 & 4 W. 4, c. 42, s. 28, supra.

<sup>(</sup>n) Calcraft v. Roebuck, 1 Ves. jun. 221; Child v. Lord Abingdon, 1 Ves. jun. 94; Comer v. Walkley, Reg. Lib. A. 1784, fo. 625; Pollexfen v. Moore, Reg. Lib. B. 1745, fo. 283, at the bottom; Smith v. Hibbard, Chanc. 11 July 1789; M'Queen v. Farquhar, Lib. Reg. B. 1804, fol. 1095; Browne v. Fenton, Rolls, June 23, 1807, MS., and see Lord Rosslyn's judgment in Lloyd v. Collet, 4 Ves. jun. 609, n; Acland v. Gaisford, 2 Mad. 28; Bradshaw v. Midgeley, V. C. 13 Nov. 1817, MS.

<sup>(</sup>o) 3 Atk. 636.

<sup>(</sup>p) Supra, vol. 2. p. 6.

<sup>(\*20)</sup> 

was to be paid at that rate; and although this understanding (\*)did not appear by any note or writing, the purchaser was decreed to pay interest at 5 per cent.

And in a case in the Court of Exchequer, it appeared

that one tenant in common had sold his share of the estate, and of the timber, to the other, who was let into possession, but no stipulation was made as to interest. The purchase-money was not paid. A bill was filed by the vendor for a specific performance, and a motion was made that the purchase-money might be paid into Court, or a receiver appointed of the estate sold. And it was accordingly referred to the Master to appoint a receiver, who was directed to pay to the vendor, out of the rents, "interest after the rate of 5 per centum per annum, upon the amount of the purchase-money, and the value of the timber on the estate(i)." This cause afterwards came to a hearing, when a specific performance was decreed, and the purchaser was decreed to pay interest. A question then arose as to the quantum, and it was decreed, that the purchaser should pay 5 per cent., although it was insisted that 5 per cent. was never given, particularly when not prayed by the bill. Lord C.B. Macdonald said, that as to the quantum, he conceived that nothing less than 5 per cent. would be a compensation to the vendor, and that, indeed, they had in many cases lately given 5 per cent. interest, and the reason of it was too well founded to need any discussion: a person would always find it to be his interest to delay the completion of his purchase, when he knows that he is only to pay 4 per cent., and can make five or six of his money. Mr. Baron Thompson concurred. Mr. Baron Graham wished there had been a general rule, but the Courts had been in the habit of giving 5 per cent. where there was delay. The reasons

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<sup>(</sup>i) Waldron v. Forester, Exch. 4th May 1804, MS.; Gaskarth v. Lord Lowther, 12 Ves. jun. 107; and see ib. 503.

(\*)formerly given had now no ground. The 4 per cent. when established, was the current interest, but now, it was holding out an inducement to persons to delay the completion of contracts, as it was notorious, that money could not be obtained for even five. Besides, here the Court had forejudged the question in making the former order, although that was without prejudice. Mr. Baron Wood concurred, and the Court carried back the interest to Lady-day 1802, when it seems they thought, upon the construction of the several agreements and letters which had passed, that the contract ought to have been completed (k).

In a very recent case 5 per cent. was decreed to be paid, although the conditions of sale were silent as to interest. The purchaser was held to have accepted the title by taking possession; and the Court said, that they thought where a purchaser withheld the money from the seller, he ought to pay such interest as the seller might have made of the money had it been paid to him, and that this had frequently been done by Lord Alvanley(l).

However, this is not the rule of the Court of Chancery, nor does the reasoning apply to times when the market rate of interest is below 5 per cent. And accordingly, in a case where the conditions of sale stipulated that the purchaser should be allowed 5 per cent. on the deposit if a title could not be made, but did not contain any other stipulation as to interest: after a decree in a bill by the seller for a specific performance, upon a motion to vary the minutes, by making the interest payable on the purchase-money 5 per cent., the Vice-Chancellor was of opinion that the general rule must prevail, and that the minutes of the decree were correct, confining the interest

<sup>(</sup>k) Excheq. 30th June 1807, MS.

<sup>(1)</sup> Burnell v. Brown, Lord C. Baron sitting for the Master of the Rolls, 7 Feb. 1820, MS.; 1 Jac. and Walk. 168.

<sup>(\*22)</sup> 

(\*)to 4 per cent., and gave the purchaser his costs of opposing the motion(m).

The same rate of interest seems payable, whether the estate be sold by private agreement, or by a Master under a decree of a court of equity.

As connected with interest, we may here observe, that if the completion of a purchase has been delayed by the state of the title, the Court will compel the seller to make an allowance for any deterioration which the lands, hedges and fences have suffered by unhusbandman-like conduct and mismanagement since the date of the contract(n).

But a purchaser is not entitled to any allowance for deterioration after he took possession, or after there was a title under which he might have taken possession(o).

Where in a specific-performance suit, the purchaser, who claimed an allowance for deterioration, paid his purchase-money into Court under an order, and the amount to be allowed for deterioration was afterwards fixed, he was held entitled to the amount, with interest from the time when he paid his money into court(p).

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SECTION II.

Of Costs.

AT law, the costs abide the event of the action by the vendor or purchaser. In equity, also, the person who

<sup>(</sup>m) Thorp v. Freer, H. T. 1820, MS.

<sup>(</sup>n) Foster v. Deacon, 3 Madd. 394, and several cases not reported.

<sup>(</sup>o) Binks v. Lord Rokeby, 2 Swanst. 226.

<sup>(</sup>p) Ferguson v. Tadman, 1 Sim. 530.

fails in the suit must prima facie be deemed liable to the (\*)costs. But still, although this is the general rule, yet costs in equity rest entirely in the breast of the Court, for the prima facie claim to the costs may be rebutted by the particular circumstances of the case; and it is for the Court to decide whether those circumstances are, or are not, sufficient to rebut the claim(q)(274).

If a purchaser file a bill for a specific performance, which is dismissed because the defendant, the seller, cannot make a title; yet the bill may be dismissed with costs

against the defendant(r).

If the vendor file a bill for a specific performance, which is dismissed because he cannot make a title, and the estate was misrepresented in the particulars, although without fraud, he must pay the costs(s)(275). If the estate was misrepresented, and the auctioneer verbally agreed to allow a deduction if any misrepresentation should appear, the seller's bill would be dismissed, with costs, if he sought to compel the purchaser to take the estate without any allowance, because that would be a fraud. But if the purchaser do not resort to the defence set up by his answer, until after the institution of the suit, that is a ground not to give costs(t).

Where there is no misrepresentation, and the question

<sup>(</sup>q) Vancouver v. Bliss, 11 Ves. jun. 458. See Scorbrough v. Burton, Barnard. Cha. Ca. 255.

<sup>(</sup>r) See and consider Benet College v. Carey, 3 Bro. C. C. 390; Lewis v. Loxham, 3 Mer. 429.

<sup>(</sup>s) Vancouver v. Bliss, ubi sup.

<sup>(</sup>t) Winch v. Winchester, 1 Ves. & Beam. 375.

<sup>(274)</sup> See Nicoll v. Trustees of Huntington, 1 Johns. Ch. Rep. 166, 182. Methodist Episcopal Church v. Jacques, 1 Johns. Ch. Rep. 65. Eastburn v. Kirk, 2 Johns. Ch. Rep. 317. Getman's Exrs. v. Beardsley, 2 Johns. Ch. Rep. 274. Williams v. Wilkins, 3 Johns. Ch. Rep. 65. Travis v. Waters, on appeal, 12 Johns. Rep. 500.

<sup>(275)</sup> See Butler v. O'Hear, 1 Des. 382, 400.

<sup>(\*24)</sup> 

turns upon a point of law, upon which the opinion of the Court might fairly be taken, although the bill be dismissed against the vendor, yet it will be without costs(u)(276). If a purchaser is entitled to costs, it is immaterial that the seller was only a trustee for sale(x).

But where the bill is dismissed against the purchaser (\*) with costs, yet he will not be allowed costs of objections argued before the Master, but abandoned at the hearing (y).

So a purchaser is considered as entitled to take a fair objection, and although it be over-ruled, yet the Court will not on that ground give costs(z); but this, of course, must always depend upon the weight which the Judge may think due to the objection(a). In one case, indeed, Lord Eldon thought that as the title was forced upon the purchaser, he should act hardly by him, by not giving the title the credit of making him pay the costs, for it would, he said, help the title. As, however, the vendor had contended, but unsuccessfully, that the purchaser had done acts amounting to an acceptance of the title, costs were refused(b)(277).

- (u) White v. Foljambe, 11 Ves. jun. 337. See ibid. 463.
- (x) Edwards v. Harvey, Coop. 40.
- (y) Hayes v. Bailey, L. C. M. T. 1821, MS.
- (z) Cox v. Chamberlain, 4 Ves. jun. 631; Stains v. Morris, 1 Ves. & Beam. 8; Sharpe v. Roahde, 2 Rose, 192.
- (a) Burnaby v. Griffin, 3 Ves. jun. 266; Bishop of Winchester v. Paine, 11 Ves. jun. 195. See Powell v. Martyr, 8 Ves. jun. 146; Fludyer v. Cocker, 12 Ves. jun. 25; Calverley v. Williams, 1 Ves. jun. 210.
  - (b) M'Queen v. Farquhar, 11 Ves. jun. 467.

<sup>(276)</sup> In Demarest v. Wynkoop, 3 Johns. Ch. Rep. 147, KENT, Chancellor, said, "It is not usual to give costs, where an unfortunate claimant has color of claim, and is barred by lapse of time." And see Lamar v. Jones, 3 Har. & M'Hen. 328.

<sup>(277)</sup> Where a plaintiff had probable cause for seeking the aid of the court, and failed in establishing his title, but the defendant shewed none,

Where the objection to the title has already been decided in a former cause, of which the purchaser had notice, the purchaser will be decreed to pay the costs of the suit(c).

And although a purchaser may fairly object to a title on the ground of a doubtful fact; yet if the fact is found against him, he cannot claim costs, although he will not be compelled to pay them. This was decided in Thorpe v. Freer(d), where the bankrupt was made a party to the suit, to establish the fact that he had not executed the power before his bankruptcy. He demurred to the bill, as he (\*)might be examined in the bankruptcy, and Sir John Leach, Vice-Chancellor, allowed the demurrer. He was then examined before the commissioners, and upon the examination it was held that the power remained unexecuted. Upon these grounds, it was contended on behalf of the purchaser that he was entitled to his costs, as it was necessary to establish the fact, but they were refused to him on the ground above stated.

In a case where the Master reported that the abstract delivered by the vendor before the filing of the bill was sufficient, but he found that the purchaser required certain evidence in support of the abstract, some of which was necessary, but not furnished, and some not necessary, the Lord Chancellor held that both of the parties were in the wrong; and, upon the vendor's bill, his Lordship held that no costs ought to be given on either side(e).

Where a seller does not make out his title until after the bill is filed, he is liable to pay the costs of the suit up

(d) MS. See 4 Madd. 466.

<sup>(</sup>c) Biscoe v. Wilks, 3 Mer. 456.

<sup>(</sup>e) Newall v. Smith, 1 Jac. & Walk. 263.

or no better title to the property in dispute, the bill was dismissed without costs on either side. Nicoll v. Trustees of Huntington, 1 Johns. Ch. Rep. 183.

to the time that he showed a good title(f). But the Court will not let this rule operate as a trap for the seller; and if further abstracts are furnished after the bill is filed, will inquire whether they are material. So as to evidence. But, as to evidence, much depends upon the fact whether further evidence was required by the purchaser. In one case an act of parliament, for releasing the estate from certain portions, was obtained after the filing of the bill. The Master found that a good title was shown when the act was delivered to the purchaser. The purchaser claimed the costs to a later day, on the ground that the act recited a release by deed of other portions, an (\*) abstract of which had not been furnished. The Vice-Chancellor held that the act was tantamount to an abstract, and that the purchaser should have called for an abstract for the deed, if he had intended to insist upon the want of it, an as objection(g).

Where the purchaser might, if he pleased, have had the evidence furnished to him before the bill is filed, although the Master reports that the title was not made out until the evidence was produced, the purchaser will have to pay the costs(h). And in Oxenden v. Lord Exmouth(i), the Court held that the suit became necessary by the improper conduct of the purchaser; and therefore the Vice-Chancellor, although he had allowed as a fact that the title to a part of the estate was not shown until after the filing of the bill, yet held that as the purchaser's misconduct rendered the suit necessary, he must pay all the costs.

In the case of Smith v. Leigh(k), the Master found that

<sup>(</sup>f) Wilson v. Allen, 1 Jac. & Walk. 623, and many MS. cases. See Wynn v. Morgan, 7 Ves. jun. 202; Collinge's case, 3 Ves. & Bea. 143, n. (a); Lewin v. Guest, 3 Russ. 325.

<sup>(</sup>g) Emery v. Growcock, 1821, MS.

<sup>(</sup>h) Long v. Collier, 4 Russ. 269; Holwood v. Bailey, 271.

<sup>(</sup>i) 13 Nov. 1833. MS. supra, p. 11.

<sup>(</sup>k) V. C. 10 Aug. 1821, MS.; and see Lill v. Robinson, 1 Beatty, 85.

the seller could make a title in February 1820, which was subsequently to filing the bill. To the Master's report the purchaser took an exception, and elected to have a case sent to law, which the Vice-Chancellor granted as a matter of course. The point was decided against him; and, upon the cause coming on for further directions, the exception was over-ruled, and a specific performance decreed, and the purchaser was to be paid the costs up to February 1820, other than the costs of his insisting, by his answer, on the illegality or abandonment of the agreement, and the purchaser was to pay the costs of the subsequent proceedings before the Master, and the costs of (\*)the case to the Common Pleas, and the plaintiff was to pay the costs of the hearing.

In the case of Bruce v. Bainbridge(l), where the bill was filed by the seller, the Master's report was in favor of the title, a case was sent to the C. P., and the certificate was against the title. The bill was dismissed with costs, from the date of the Master's report.

But if a good title is not shown until *after* the bill is filed, and the purchaser take no step inconsistent with the finding of the Master, the seller must pay the costs of the whole suit(m).

If a seller, upon a reference to the Master, establish his title upon a different ground from what appeared in the abstract, the purchaser will be allowed the costs of the reference and the applications to the  $\operatorname{Court}(n)$ . So, where a purchaser might in the first instance have rescinded the contract, but binds himself by long acquiescence, the vendor will not be entitled to  $\operatorname{costs}(o)$ .

<sup>(</sup>l) Same day, MS.

<sup>(</sup>m) Annesley v. Muggeridge, V. C. 12 Mar. 1825, MS.; and Osbaldeston v. Askew, V. C. 11 Mar. 1829, MS.

<sup>(</sup>n) Fielder v. Higginson, 3 Ves. & Bea. 142.

<sup>(</sup>o) Dickenson v. Heron, sup. vol. 2. p. 6.

<sup>(\*28)</sup> 

Lord Thurlow has said, that if a purchaser will not wait until the title is cleared, but will take possession, and put the vendor to all the inconvenience of the discussion, when he is out of possession, and the other has got it, that weighs much as to costs(p). But the circumstance of taking possession is not important, where, by the terms of the contract, the title is to be made good at a subsequent period, much less is it material where the purchaser is induced to take possession at the instance of the vendor himself(q).

(\*)It is, however, to be repeated, that every case must stand on its own grounds, although, from these few instances, some notion may perhaps be formed of what the Court is likely to do in other cases. To multiply the instances in which costs in equity have been given or refused would be as useless as it would be tedious.

<sup>(</sup>p) 11 Ves. jun. 464. See Calcraft v. Roebuck, 1 Ves. jun. 222.

<sup>(</sup>q) 11 Ves. jun. 464. Vide sup. vol. 1. p. 10.

## (\*)CHAPTER XI.

OF THE OBLIGATION OF A PURCHASER TO SEE TO THE APPLICATION OF THE PURCHASE MONEY.

WHERE a trust is raised by deed or will for sale of an estate, a clause, that the receipts of the trustees shall be sufficient discharges for the purchase-money, is mostly inserted, and rarely ought to be omitted; because, notwithstanding that a purchaser would, at law, be safe in paying the money to the vendors, although they were trustees, yet equity will, in some cases, bind purchasers to see the money applied according to the trust, if they be not expressly relieved from that obligation by the author of the trust; and where the purchaser is bound to see to the application of the money, great inconvenience frequently ensues, and, in some instances, it would be difficult to compel the purchaser to complete the contract.

The rules on this subject,—principally with a view to testamentary dispositions,—may be considered under two heads: First, with respect to real estate. Secondly, with respect to leaseholds, or chattels real. For the rules applicable to the different species of estates are, as regards testamentary gifts, dissimilar; owing to the much greater power which a testator has over his real, than over his personal estate.

Previously to the statute of fraudulent devises(a), freehold lands were not bound by even specialty debts in the hands of an hæres fuctum; although an hæres natus was

<sup>(</sup>a) 3 W. & M. c. 14.

(\*) liable to specialty debts in respect of land descended(I); but personal property, which was formerly of very trifling value, was always holden to be subject to the payment of debts generally, however the same might be bequeathed. And by the statute of Westminster 2,(b), it was enacted, that even the ordinary should be bound to pay the debts of the intestate, so far as his goods would extend, in the same manner as executors were bound in case the deceased had left a will. In fact, no man can exempt his personalty from the payment of his debts; but it must go to his executors as assets for his creditors, and be applied in a due course of administration; that is, however it may be bequeathed, it must go to the executors, upon trust, in the first place, for payment of debts generally. Now, although the author of the trust may have neglected to free the purchasers of his property from the obligation of seeing that the money is duly applied, yet equity hath thought it reasonable that a purchaser should see to the application of the purchase-money where the trust is of a defined and limited nature only; and not where the trust is general and unlimited, as a trust for payment of debts generally.

## (b) 13 Ed. I. c. 19.

<sup>(</sup>I) Although an heir at law is bound by specialty debts in respect of lands descended, yet a purchaser of those lands, without notice of any debts, was never holden to be subject to them. The statute of fraudulent devises was always considered as placing a devisee on exactly the same footing as an heir at law; but it was lately contended (see Mathews v. Jones, 2 Anst. 506,) that the debts of the testator would bind a purchaser from the devisee, although he bought bonâ fide and without notice. But this was over-ruled. Equity will, however, in behalf of creditors, grant an injunction against a purchaser to restrain payment to the heir. Green v. Lowes, 3 Bro. C. C. 217. In Woodgate v. Woodgate, MS. Lord Eldon was of opinion, that simple contract creditors, under 47 Geo. III. stand in the above respect in the same situation as specialty creditors under the statute of fraudulent devises.

(\*) From these rules it necessarily follows, that a bona fide purchaser of a leasehold estate from an executor ought not to be bound to see to the application of the purchase-money, although defined and limited trusts be declared of the purchase-money. But, as a testator can declare an original limited trust of his real estate, wherever such a trust is created, the purchaser is bound to see the money duly applied.

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## SECTION I.

Of this Liability, with reference to Real Estate.

AND first, with respect to real estate.

- 1. If the trust be of such a nature, that the purchaser may reasonably be expected to see to the application of the purchase-money, as if it be for the payment of legacies, or of debts which are scheduled or specified, he is bound to see that the money is applied accordingly (c)(279), and that although the estate be sold under a decree of
- (c) Culpepper v. Aston, 2 Cha. Ca. 221. See Show. 313; Spalding v. Shalmer, 1 Vern. 301; Dunch v. Kent, 1 Vern. 260; Anon. Mose. 96; Abbot v. Gibbs, 1 Eq. Ca. Abr. 358, pl. 2; Elliott v. Merryman, Barnard. Rep. Cha. 81; Smith v. Guyon, 1 Bro. C. C. 186, and the cases cited in the note(I); and see 1 Ves. 215.

<sup>(</sup>I) One of these cases, Langley v. Lord Oxford, is in Reg. Lib. B. 1747, fol. 300; see post, S. C. Ambl. 17. The other cases, Tenant v. Jackson, and Cotton v. Everall, are in Reg. Lib. 1773, B. fol. 120, 481.

<sup>(279)</sup> See Murray v. Ballou, 1 Johns. Ch. Rep. 566. 575. Lining v. Psyton, 2 Des. 375: and note, 378.

(\*32)

a court of equity(d), or by virtue of an act of parliament(e)(280).

And the 47 Geo. 3, c. 74(f), which makes the real (\*)estates of traders liable to simple-contract debts, does not alter the rule; and therefore a purchaser from a devisee of a trader is liable to the application of the purchase-money where legacies only are charged on the estate by the will(g); and the same principle will therefore apply to the 3 & 4 Will. 4, c. 104, which makes all real estates of persons who die after the 29th of August 1833, liable to all simple-contract debts.

2. If more of an estate be sold than is sufficient for the purposes of the trust, that will not turn to the prejudice of the purchaser; for the trustees cannot sell just sufficient to pay the debts, &c. Besides, in most cases, money is to be raised to pay the trustees' expenses(h).

3. Where the trust is for payment of debts generally, a purchaser is not bound to see to the application of the purchase-money, although he has notice of the debts; for a purchaser cannot be expected to see to the due observance of a trust so unlimited and undefined (i)(281).

4. Nor is a purchaser bound to see the money applied, where the trust is for payment of debts generally, and

<sup>(</sup>d) Lloyd v. Baldwin, 1 Ves. 173. See Binks v. Lord Rokeby, 2 Madd. 227.

<sup>(</sup>e) Cotterell v. Hampson, 2 Vern. 5.

<sup>(</sup>f) Repealed and re-enacted by the 1 W. 4, c. 47.

<sup>(</sup>g) Horn v. Horn, 2 Sim. & Stu. 448.

<sup>(</sup>h) Spalding v. Shalmer, 1 Vern. 301.

<sup>(</sup>i) See the cases cited above, and Humble v. Bill, 1 Eq. Ca. Abr. 358, pl. 4; Ex parte Turner, 9 Mod. 418; Hardwicke v. Mynd, 1 Anstr. 109; and Williamson v. Curtis, 3 Bro. C. C. 96; Barker v. Duke of Devon, 3 Mer. 310.

<sup>(280)</sup> See Falliaferro v. Minor, 1 Call, 524.

<sup>(281)</sup> See Lining v. Peyton, 2 Des. 378; in note.

also for payment of legacies(I); because, to hold that he is liable to see the legacies paid, would in fact involve (\*)him in the account of the debts, which must be first paid(j)(II).

5. And for the same reason the purchaser is, of course, not bound to see that only so much of the estate is sold

as is necessary for the purposes of the trust.

- 6. But although there be no specification of the debts, yet a purchaser, it is said, must see to the application of the money where there has been a decree; as that reduces it to as much certainty as a schedule of the debts. In such cases, therefore, the purchaser should not pay to the trustees, but must see to the application, and take assignments from the creditors: otherwise he should apply to the Court, that the money may be placed in the Bank, and not taken out without notice to him; the reason of which is, that it is at his peril(k). It is now, however, the prevailing opinion that the purchaser is not, in such a case, bound to see to the application of the money. The Court takes upon itself the application of the money.
  - 7. It is the general opinion of the Profession, that
- (j) Jebb v. Abbot, and Benyon v. Collins, Butler's n. (1) to Co. Litt. 290 b, s. 12; and Rogers v. Skillicorne, Ambl. 188.

(k) Lloyd v. Baldwin, 1 Ves. 173.

<sup>(</sup>I) The above rule, although so long and clearly settled, appears to have been entirely overlooked in the case of Omerod v. Hardman, before the Duchy Court, reported in 5 Ves. jun. 722; but this case can by no means be considered as an authority, and has been expressly denied by Lord Eldon See 6 Ves. jun. 654, n. Qu. however, whether the case of Omerod v. Hardman was not thought to be within the principle stated in pl. 13, post.

<sup>(</sup>II) And where the whole money has been raised, the heir or devisee will be entitled to the estates unsold, and the creditors or legatees will have no remedy against the same; because the estate is debtor for the debts and legacies, but not for the faults of the trustees. Anon in Dom. Proc. 1 Salk. 153.

where the time of sale is arrived, and the persons entitled to the money are infants or unborn, the purchaser is not bound to see to the application of the money; because he would otherwise be implicated in a trust, which in some cases might be of long duration. This point has lately been so decided(l).

- (\*)8. But if an estate is charged with a sum of money for an infant, payable at his majority, and there is no direction to appropriate the money, a purchaser cannot safely complete his purchase, although the money be invested in the funds as a security for the payment of the legacy to the infant, when he shall become entitled; for if, in the event, the fund should turn out deficient for payment of the infant's legacy, he may still have recourse to the estate for the deficiency. And it should seem, that even a court of equity cannot, in a case of this nature, bind the right of an infant(m).
- 9. It appears to be thought by the Profession, that although the trusts are defined, yet that payment to the trustees is sufficient, wherever the money is not merely to be paid over to third persons, but is to be applied upon trusts which require time and discretion, as where the trust is to lay out the money in the purchase of estates (282).

And it now appears that this point was decided as far back as in 1792(n), where in a settlement of real estates with a power of sale, the trustees were to receive the purchase-money, and to lay it out again in lands to the uses of the settlement, and till that was done to invest it in government funds, &c. It was objected that a good

<sup>(1)</sup> Sowarsby v. Lacy, 4 Madd. 142; Lavender v. Stanton, 6 Madd. 46; Breedon v. Breedon, 1 Russ. & Myl. 413.

<sup>(</sup>m) Dickenson v. Dickenson, 3 Bro. C. C. 19.

<sup>(</sup>n) Doran v. Wiltshire, 3 Swanst. 699.

title could not be made, as there was no clause that the trustees' receipts should be good discharges. The Lord Chancellor said: As to the power which the trustees have of giving a discharge, it is true, that when land is to be sold, and a particular debt is to be paid with it, the purchaser is bound to see to the application of the purchase-money. But in cases where the application is to a payment of debts generally, or to a general laying out of the money, he knew of no case which lays down, or (\*) any reasoning in any case which goes the length of saying that a purchaser is so bound; and therefore he conceived that the receipt of the trustees would be a good discharge in this case.

In a recent case, where the trust was to pay the money amongst creditors, who should come in within eighteen months, the estate was sold after that time had elapsed, and Sir William Grant, Master of the Rolls, held, that the receipt of the trustees was a good discharge(o). The deed, he observed, very clearly conferred an immediate power of sale, for a purpose that could not be immediately defined, viz. to pay debts which could not be ascertained until a future and distant period. It was impossible to contend that the trustees might not have sold the whole property at any time they thought fit, after the execution of the deed; and yet it could not be ascertained, until the end of eigliteen months, who were the persons among whom the produce of the sale was to be distributed. If the sale might take place at a time when the distribution could not possibly be made, it must have been intended that the trustees should, of themselves, be able to give a discharge for the produce; for the money could not be paid to any other person than the trustees. It is not material that the objects of the trust might have been actually

<sup>(</sup>o) Balfour v. Welland, 16 Ves. jun. 151. (\*36)

ascertained before the sale. The deed must receive its construction as from the moment of its execution. According to the frame of the deed, the purchasers were or were not liable to see to the application of the money; and their liability could not depend upon any subsequent event. Another ground relied upon in this case, was, that the creditors were parties to the deed, and it was clearly intended that the trustees should receive and apply the money.

(\*)10. So where the trust is to lay out the money in the funds, &c. upon trusts, if the purchaser see it invested according to the trust, and procure the trustees to execute a declaration of trust, he is in practice considered as discharged from the obligation of seeing to the further application of the money.

This appears to have been the settled practice in Mr. Booth's time; for in answer to a question how far a purchaser was, in a case of this nature, bound to see to the application of the purchase-money, he said he was of opinion, that all that would be incumbent on the purchaser to see done in the case, would be to see that the trustees did invest the purchase-money in their own names, in some of the public stocks or funds, or on government securities; and in such case the purchaser would not be answerable for any non-application (after such investment of the money) of any monies which might arise by the dividends or interest, or by any disposition of such funds, stocks or securities, it not being possible that the testator should expect from any purchaser any further degree of care or circumspection than during the time that the transaction for the purchasemoney was carrying on; and therefore the testator must be supposed to place his sole confidence in the trustees; and this, he added, was the settled practice in such cases, and he had often advised so much and no more to be

done; and particularly in the case of the trustees under the Duchess of Marlborough's will. And in this opinion Mr. Wilbraham concurred(p).

11. The same rules respecting the liability of a purchaser to see to the application of the purchase-money appear to apply, whether the estate be devised or conveyed to trustees to sell for payment of debts, &c. or (\*)whether it be only charged with the debts; although a difference of opinion has prevailed in the Profession on this point.

In a case in Mosely(q) it was laid down, that a purchaser should be bound to see to the application of the purchase-money where the debts were only charged on the estate.

But in Elliot v. Merryman(r), the Master of the Rolls decreed otherwise; because, if the contrary rule were holden, no estate could in such cases be sold, except through the medium of the Court of Chancery, which would be productive of the greatest inconvenience.

Lord Camden(s) appears to have been of the same opinion; and in a late case(t) Lord Eldon said, that where a man, by a deed or will, charges or orders an estate to be sold for payment of debts generally, and then makes specific dispositions, the purchaser is not bound to see to the application of the purchase-money.

This point may be considered as settled upon principle, as well as authority. For although a mere charge is no legal estate, but only that declaration of intention upon which a court of equity will fasten, and by virtue of which they will draw out of the mass going to the heir,

(p) See 2 vol. Cas. & Opin. 114.

<sup>(</sup>q) Anon. Mose. 96; and see Newell r. Ward, Nels. Cha. Rep. 38.

<sup>(</sup>r) Barnard. Rep. Cha. 78; 2 Atk. 41; Ambl. 189, marg.

<sup>(</sup>s) See Walker v. Smalwood, Ambl. 676.

<sup>(</sup>t) See 6 Ves. jun. 654, n.

<sup>(\*38)</sup> 

or to others, that quantum of interest that will be sufficient for the debts(u); yet it is as much a trust, as a direct conveyance or devise to trustees for the same purpose: the only difference is, that in the case of a charge, the trust arises by the construction of equity; whereas in the case of a conveyance or devise, it is produced by the express declaration of the party; and when the trust is (\*)in esse, it seems wholly immaterial by what means it has arisen.

And where an estate is given to a devisee, he paying the debts, so that the words are sufficient to pass the fee, a purchaser from the devisee cannot be affected by any gift over of the estate, for the devisee has a right to sell to pay the debts, and if the price of the estate is more than will satisfy the debts, the remedy of the devisees over is against the first devisee, and not against the purchaser(x).

It seems hardly necessary to remark, that where lands are charged with the payment of annuities, those lands will be liable in the hands of a purchaser, because it was the very purpose of making the lands a fund for that payment, that it should be a constant and subsisting fund(y).

So where an estate is devised, subject to existing charges, the purchaser must of course see the charges duly paid.

12. But if the sale or mortgage, from the circumstances of the transaction, afford evidence that the money was not to be applied for the debts or legacies, the purchaser or mortgagee will hold liable to the charge(z).

<sup>(</sup>u) See Bailey v. Ekins, 7 Ves. jun. 323.

<sup>(</sup>x) Dolton v. Hewen, 6 Madd. 9.

<sup>(</sup>y) Elliot v. Merryman, Barnard. Rep. Cha. 82. Sec Wynn v. Williams, 5 Ves. jun. 130.

<sup>(</sup>z) Watkins v. Cheek, 2 Sim. & Stu. 199.

13. In Johnson v. Kennett(a), the estate was devised to the son in fee, subject to the debts, an annuity to the widow and legacies to the daughters. The son also was entitled to the personal estate. Two or three years after the testator's death, the son and his wife levied a fine and conveyed the estate without reference to the debts and legacies to uses to bar dower. The son then sold the estate in lots to several purchasers. The conveyances (\*) recited the will, the conveyance and fine, the contract to sell, and an agreement to give to the purchasers a bond of indemnity against the legacies. The deeds did not recite that the debts were paid. In some of the deeds the widow joined and released her annuity pro tanto. Each purchaser had a bond of indemnity against the legacies, in which no notice was taken of the debts. The daughters filed a bill against the purchasers and the assignee of the son. The bill stated that the son had paid the debts, and that the legacies were unpaid. The answers did not deny that the debts had been paid, and stated the belief of the purchasers that the legacies were unpaid. It was held that the estates were still charged with the legacies in the hands of the purchasers, for they dealt with the son, not as a trustee for the widow and daughters but as the owner of the estate, and they were aware that the legacies were unpaid, and did not represent that they were told or supposed that the debts were unpaid.

14. These are the distinctions which, according to the books, appear to exist in regard to the liability of a purchaser to see to the application of money arising by sale of estates conveyed or devised to trustees upon trust to sell; but the reader must be apprised, that some gentlemen are of opinion, that a purchaser is in no case bound to see to the application of purchase-money, where there

<sup>(</sup>a) V. C. 10 Dec. 1833, MS.

<sup>(\*40)</sup> 

is a hand appointed to receive the money. And it appears that Lord Kenyon, when Master of the Rolls, inclined strongly to the opinion, although he made no decision, that trustees having the power to sell, they must have the power incident to the character, viz. the power to give a discharge(b).

And Sir William Grant observed, that he thought the (\*)doctrine upon this point had been carried farther than any sound equitable principle would warrant. Where, he added, the act is a breach of duty in the trustee, it is very fit that those who deal with him should be affected by an act tending to defeat the trust of which they have notice; but where the sale is made by the trustee in performance of his duty, it seems extraordinary that he should not be able to do what one should think incidental to the right exercise of his power, that is, to give a valid discharge for the purchase-money. But it was not necessary to determine that in the case before His Honor(c).

Of those who hold that a purchaser is only liable to see to the application of the money where there is not a hand appointed to receive the money, and the trusts of the money are defined, Mr. Powell is the only one whose reasons are before the Profession(d). The whole of Mr. Powell's argument(I) appears to have been suggested to him, and indeed depends on the case of Cuthbert v. Baker. For throughout the many cases which have been referred to in this chapter, the decisions have invariably been pronounced on the distinction between a limited and a general trust; and in no case has the appointment of a hand to receive the money been considered as affect-

<sup>(</sup>b) See 4 Ves. jun. 99.

<sup>(</sup>c) See 16 Ves. jun. 156.

<sup>(</sup>d) See 1 Mortg. 312-330, 4th edition.

<sup>(</sup>I) See the 3d edition of Powell on Mortgages, where the point is not noticed.

ing the question, any further than that it at one time seems to have been thought, that in every case of a mere charge, the purchaser was bound to see to the application of the money. That this was always deemed the true distinction, is evinced by manuscript and printed opinions to that effect, of all the most leading characters in the Profession of the last and present century. So Lord (\*)Eldon, in condemning the doctrine advanced in Omerod v. Hardman(e), did not say it was wrong because there was a hand appointed to receive the money (which was the fact), but because the first trust was for payment of debts generally.

Mr. Powell, however, was not singular in his construction of the decree in the case of Cuthbert v. Baker. It is well known by the Profession, that Lord Redesdale, who was counsel for Baker, the purchaser, considered the decision in the same light.

The case is thus stated by Mr. Powell:—A. made his will (f), and thereby directed that all his personal estate (except as therein excepted) should be applied, as far as the same would extend, in payment of debts, legacies, and funeral expenses, and of all annuities by him granted; and if such personal estate should not be sufficient for those purposes, then it was his further will and desire, and he did direct, that the deficiency, whatever it might be, should be paid and made good out of his real estate (except a part therein mentioned, which he did not intend to make subject thereto), and which real estates he charged with the payment of such deficiency, to whose hands soever the same came. And so subject and exempt, he gave, devised, &c. all his real and personal estate in the following manner: certain parts of his estate to his wife

<sup>(</sup>e) See 6 Ves. jun. 654, n. et supra, n. (I) to s. 4.

<sup>(</sup>f) Mr. P. refers to 4th July 1790, Reg. Lib. 4, 441; the correct reference is Lib. Beg. A. 1790, fo. 442.

<sup>(\*42)</sup> 

in fee; and as to the manors, messuages, &c. not given to his wife in fee, he devised them to his wife for life; and, after her decease, he gave the same to trustees, in trust to sell and to divide and to distribute the money which should arise by such sale between and amongst such child or children of A. B., on the body of his then (\*) wife begotten; and such children of C. D.(I) as should be living when the devise to the trustees should take effect, equally share and share alike, to take per capita, and not per stirpes: if but one such child, the estate to be transferred to him, and not to be sold. The wife died. One trustee died in her life-time. The surviving trustee sold the estate by auction. The personal estate was sufficient to discharge the debts: the claimants under the devise to children were seven children of A. B., and six children of C. D.(II), who were entitled to the purchasemoney in equal shares. One of the children of C. D. was in the East Indies, and two were infants. The purchaser refused to complete his purchase, objecting thereto on the ground, that there being no proviso in the will to exonerate the purchaser from seeing to the application of the money, the purchaser was bound to know or find out what children of the persons in that behalf named were living at the testator's wife's death; for that such children ought individually to execute the conveyance, and give releases for their respective claims; and that one being in the East Indies, and two being infants, could not join in such conveyance. But the decree was, that the contract should be carried into execution, that the infants' shares of the purchase-money should be paid to the Accountant-general, and that the remainder of the purchase-money should be paid to the trustee. The de-

<sup>(</sup>I) This is mis-stated, for the money was given to such of the children of three persons as should be living at the time when the devise to the trustees should take effect.

<sup>(</sup>II) This is inaccurate. There were seventeen children in all.

cree proceeded to direct that all proper parties should

join in the proper conveyances.

Mr. Powell observes, that this decision, though not final, as it still left room for an application to the Court to determine who might be proper parties to the conveyance(\*) appeared to him to be conclusive on the question, whether the persons beneficially entitled are necessary parties; because there could be no ground to consider those persons as necessary parties, unless it were to discharge the purchaser: but there seemed to him to be no power in the Court to compel a person beneficially interested in money to arise by sale of land, to discharge that land, unless it were upon paying or securing the money to him. But the Court, by directing the payment to the trustee, had none that which rendered a direction to pay to the cestui que trust impossible.

It will be seen that Mr. Powell's argument is entirely founded on the order to pay the remainder of the purchase-money to the trustee, and this ground wholly fails him; for all the cestuis que trust were plaintiffs, and the prayer of the bill was, that the infants' shares might be invested, and that the remainder of the purchase money

might be paid to the trustee.

It is not noticed in the foregoing statement of the case, that no costs were given; but the fact is, that the purchaser was refused his costs, and that circumstance may perhaps induce a conclusion, that the construction put

upon the case by Mr. Powell is correct.

But it is conceived, that there is a ground upon which the decision may be supported without impeaching the settled doctrine on this subject. The trust was for *such* of the children of three persons as should be living when the estate should fall into possession, and it was strongly insisted by the bill, and, it is apprehended, with great reason, that the *cestuis que trust* were in regard to the

purchaser undefined; and he was not bound to ascertain or inquire how many there were, and who they were. The facts of the case were such as to tempt a Judge to put that construction on the trust; there were seventeen children, two of whom were infants, and another was in (\*)the East Indies. It should seem, therefore, that there is a solid principle to which Lord Thurlow's decision can be referred, and, consequently, a purchaser can scarcely be advised to incur the risk of paying money to a trustee, on the authority of this case, in opposition to the former decisions. Perhaps another ground remains upon which the decision might have been made. All the cestuis que trust of age, and in the kingdom, offered, previously to the commencement of the suit, to give receipts for their shares: the receipt of the trustee would certainly have been a sufficient discharge for the shares of the infants, and also, as it is conceived, for the share of the cestui que trust, who was abroad. And in this view of the case the purchaser was clearly liable to the costs. It were difficult to maintain, that the absence of a cestui que trust in a foreign country shall, in a case of this nature, impede the sale of the estate. Lord Thurlow's judgment in this case would be a very desirable present to the Profession. In a case which came before the same Judge a few years before that of Cuthbert v. Baker, and which I learn from a gentleman who has seen the papers relating to the estate, is correctly reported, the estate was subjected to the payment of debts generally; and his Lordship said, that the purchaser was a mere stranger, and was not bound to look to the application; where the estate is to be sold, and a specific sum, as 5l., to be paid to A., the purchaser must see to the application; but where it is to be sold generally, he is not(g).

In the case of Currer v. Walkley, reported in Mr.

<sup>(</sup>g) Smith v. Guyon, 1783, 1 Bro. C. C. 116.
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Dickens' second volume(h), which was also before Lord Thurlow, it is stated that the testator had devised estates, subject to particular charges: he afterwards entered into a contract for sale of a part of the estate, and the purchaser (\*) paid the sum of 600l. as a deposit. The bill was for an account of what was due to the plaintiff in respect of his charge, and that the purchaser might pay out of the remainder of his purchase-money what remained due to the plaintiff. Lord Thurlow is reported to have said, that if an estate is devised to trustees to sell, and the testator afterwards contracts for the sale of the estate, it is enough for the purchaser to pay the purchase-money into the hands of the trustees, to apply it, as it doth not lie with him to see it applied; but if the estate be devised, subject to particular charges, it is incumbent on him to see it applied in payment of those particular charges.

This case seemed to apply to the point under discussion; but no reliance could be placed upon it, as it was to be inferred from the report, that Lord Thurlow held, that a devise of an estate was not revoked in equity by a subsequent contract for sale of it—a doctrine which it was difficult to suppose could have fallen from so great a

Judge.

The case is stated in the Registrar's book(i), by the name of Comer v. Walkley, and Mr. Dickens' report of it is a complete mis-statement. The estate was originally devised to trustees upon trust, to sell and pay debts generally. The estate was subject to an annuity at the death of the testator. The trustee sold a part of the estate for 720l., 600l. was left in the purchaser's hand as an indemnity against the annuity. The purchaser afterwards paid 250l., part of the 600l., to the trustee. By several conveyances, &c. the estate purchased became again

<sup>(</sup>h) 2 Dick. 649.

<sup>(</sup>i) Reg. Lib. A. 1784, fol. 625.

<sup>(\*46)</sup> 

vested in trustees upon trust, to sell for payment of debts generally. These trustees sold the estate to Charles Whittard, who objected to complete the contract without the concurrence of the person entitled to the residue, then (\*)unpaid, of the 600l. After a great lapse of time the person entitled to the residue of the 600l. filed a bill against Whittard and others for payment of it; and Whittard filed another bill for a specific performance, which was accordingly decreed; and the proper accounts were directed to be taken in the first cause. Whittard's costs in both causes were allowed to him. The decision, therefore, appears to have been, that the 600l. was a lien on the land. The latter part of Lord Thurlow's judgment, reported by Dickens, clearly referred to the annuity, which was a subsisting charge on the estate at the testator's death. And adverting to the circumstances of the case, the first part of the judgment may, perhaps, be read thus: If an estate is devised to trustees to sell, and the trustees afterwards contract for the sale of the estate, it is enough for he purchaser to pay the purchase-money into the hands of the trustees to apply it, as it doth not lie with him to see it applied. Now this, as corrected, seems in favor of the opinion, that where a hand is appointed to receive the money, a purchaser is not bound to see to the application of the purchase-money; but it should not be forgotten, that this observation was made in a case where the trust was for payment of debts generally.

15. Where the trust is to raise so much money as the personal estate shall prove deficient in paying the debts, or debts and legacies, it seems formerly to have been doubted whether the purchaser was not bound to ascertain the deficiency. Mr. Fearne thought a purchaser was bound to do so(k). But the opinion of the Profession is

certainly otherwise(l). Indeed, a direction that the personal estate shall be first applied, only expresses the rule of equity, where, as in a case of this nature, no intention appears to exonerate the personalty from the payment of (\*)the debts; and, therefore, such a direction cannot be deemed material.

16. Where a mere power is given to trustees to sell, for the purpose of raising as much money as the personal estate shall prove deficient in paying the debts, or debts and legacies, it seems that unless the personal estate be actually deficient, the power does not arise, and consequently cannot be duly executed (283). This was expressly decided in the case of Dike v. Ricks(m), where, in a case of this nature, it was determined by Jones, Croke and Barkeley, Justices, unanimously, that the condition was a precedent condition, and that the performance of it ought to be sufficiently averred, otherwise the power would not authorize a sale; and that the amount of the debts, and the value of the personal estate, ought to be shown, so that the court might judge whether the condition was performed or not; and also that so much only of the estate could be sold as was sufficient for payment of the debts. And the case of Culpepper v. Aston(n), also appears to be an authority, that in such a case a purchaser is bound to ascertain the deficiency; for in that case the will seems to have given a mere power(o) to the executors to raise as much money as the personal estate should fall short in paying the debts. The will was revoked pro

<sup>(1)</sup> See the 12th section of Mr. Butler's n.(1) to Co. Litt. 209 b.

<sup>(</sup>m) Cro. Car. 335; Wm. Jones, 327; 1 Ro. Abr. 329, pl. 9; 3 Vin. Abr. 419, pl. 9.

<sup>(</sup>n) See 2 Cha. Ca. 221.

<sup>(</sup>o) 2 Cha. Ca. 115.

<sup>(283)</sup> See Welman v. Lawrence, 15 Mass. Rep. 326. Seymour v. Bull, 3 Day, 388. Williams v. Peyton, 4 Wheat. 77.

<sup>(\*48)</sup> 

tanto by a subsequent conveyance creating a direct trust to sell and pay debts, under which it seems the purchaser bought; and therefore the point did not call for a decision. But it was resolved, that by the trust (that is, power,) in the will to sell, the purchaser did purchase at his own peril, if the personal estate received were sufficient; but that if the trust were as in the deed, the purchaser was safe.

(\*) The reader must be aware, that as the power is not well executed, unless there be a deficiency, a purchaser must, at his peril, ascertain the fact, notwithstanding that the trust be for payment of debts generally; or being for payment of particular debts or legacies, the common clause, that the trustee's receipts shall be sufficient discharges, be inserted in the instrument creating the trust.

Wherever, therefore, a power of this nature is given, and even where a trust for such purposes is raised, it seems advisable, as Mr. Butler remarks, to extend this clause a degree farther, by expressly discharging the purchaser or mortgagee from the obligation of inquiring, whether the personal estate has been got in and applied; and by expressly authorising the trustees to raise any money they may think proper by sale or mortgage, though the personal estate be not actually got in or applied. For it frequently happens, that the getting in of the personal estate is attended with great delay and difficulty; during which the real estate cannot perhaps be resorted to. This will be obviated effectually by inserting a clause to the above effect. It should, however, be accompanied with a further direction, that so much of the personal estate, and the money raised under the trust, as shall remain after answering the purposes of the trust, shall be laid out in land, to be settled on the devisees of the real estates(o).

<sup>(</sup>o) Butler's n. (1) to Co. Litt. 290. b.

17. Where a purchaser is bound to see the money applied according to the trust, and the trust is for payment of debts, or legacies, he must see the money actually paid to the creditors or legatees.

In cases of this nature, therefore, each creditor or legatee, upon receiving his money, should give as many receipts as there are purchasers, so that each purchaser (\*)may have one. Or, if the creditors or legatees are but few, they may be made parties to the cnoveyances.

Another mode by which the purchasers may be secured is, an assignment by all the creditors and legatees of their debts and legacies to a trustee, with a declaration that his receipts shall be sufficient discharges; and then the trustee can be made a party to the several conveyances.

Sometimes a bill is filed for carrying the agreement into execution, when the purchase-money is of course directed to be paid into court; and this is the surest mode, because the money will not be paid out of court without the knowledge of the purchaser.

18. If the names of the trustees be inserted in the usual clause, that the receipts of the trustees shall be discharges, every trustee who has accepted the trust must join in the receipt for the purchase-money, although he may have released the estate to the other trustees(p); because, notwithstanding that he release the legal estate to his co-trustees, he cannot delegate the personal trust and confidence reposed in him; for the rule is, delegatus non potest delegare.

To obviate this difficulty, which frequently occurs, it might, perhaps, be advisable (instead of naming the trustees in the clause) to say, that the receipts "of the trustees or trustee, for the time being, acting in the execu-

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<sup>(</sup>p) Crewe v. Dicken, 4 Ves. jun. 97. See post. Small v. Marwood, 9 Barn. & Cress. 307; 4 Mann. & Ryl. 181.

tion of the trusts hereby created," shall be sufficient discharges. This would probably render it unnecessary for a trustee who had released the estate to join in any receipt:—there could not be the slightest ground to contend, that any personal trust or confidence was given to the trustees named in the instrument creating the trust; and therefore the receipt of the trustees acting in the (\*)trusts, for the time being, would satisfy as well the words as the spirit of the clause(q).

- 19. But as one man cannot impose a trust on another against his consent, a trustee who has refused to accept the trust, and actually renounced, need not join in any receipts; in such cases the receipts of the other trustees will be sufficient discharges(r). And it seems, that where there is a release instead of a disclaimer, yet if the operation of the act is disclaimer the release must be considered as a disclaimer(s). This of course cannot apply to any case where the trustee has acted in execution of the trusts, for the estate is then vested in him, and it is too late to disclaim.
- 20. Where an estate is devised or conveyed to trustees to sell for payment of debts generally, without a clause that their receipts shall be discharges, and they convey to a third person, for the purposes of the trust, sales made by him are said to be as effectual as sales made by the trustees themselves, and his receipt is equally a discharge to a purchaser(t).
- 21. If an estate is vested in trustees to sell, with power to give receipts, but no power is added to appoint new trustees, and upon a bill filed, the Court appoints

<sup>(</sup>q) See Co. Litt. 113 a.

<sup>(</sup>r) See Sir William Smith v. Wheeler, 1 Ventr. 128; Hawkins v. Kemp, 3 East, 410; Adams v. Taunton, 5 Madd. 435.

<sup>(</sup>s) Nicloson v. Wordsworth, 2 Swanst. 365.

<sup>(</sup>t) Hardwicke v. Mynd, 1 Anstr. 109. See Ld. Braybroke v. Inskip, 8 Ves. jun. 417; sed qu.

new trustees, they can give a valid discharge; for the effect of the conveyance to the new trustees is to bind the legal estate, and the decree of the Court binds the equity; so that the new trustees have the same power to give receipts as the original trustees had(u).

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## (\*)SECTION II.

Of this Liability, with reference to Leasehold Estates.

1. We have already seen, that however leasehold estates may be bequeathed, they must go to the executors, to be applied, in the first place, in a due course of administration, which is tantamount to a bequest for payment of debts generally. And, therefore, in analogy to the decisions upon devises of real estates for a similar purpose, it is incontrovertibly settled, that a purchaser of personalty shall in no case be bound to see to the application of the purchase-money where he purchases bona fide, and without notice that there are no debts(w).

This principle was adhered to in the case of Humble v. Bill(x), before Sir Nathan Wright, where a man bequeathed a specific part of his personalty upon trust to raise a sum of money for his daughter, and the executors mortgaged it, pretending want of assets. The decision

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<sup>(</sup>u) Drayson v. Pocock, 4 Sim. 283.

<sup>(</sup>w) Elliot v. Merryman, Barnard. Rep. Cha. 78; 2 Atk. 41. See Watts v. Kancy, Toth. 141; S. C. ibid. 227, by the name of Mutts v. Kancie; and Nurton v. Nurton, ibid.

<sup>(</sup>x) 2 Vern. 444; 1 Eq. Ca. Abr. 358, pl. 4.

was, however, reversed in the House of Lords(y); but the reversal is generally supposed to have proceeded from proof of fraud, and has not been attended to in subsequent cases.

Thus, in Ewer v. Corbet(z), it was expressly holden, that a term being bequeathed to A, did not prevent the executors from selling it; and that notice of the devise was nothing, as every person buying of an executor necessarily must have such notice. And the Master of (\*)the Rolls said, he remembered it to have been once ruled, that an executor could not make a good title to a term to a purchaser, and that was in the case of Bill v. Humble; but since that he took it to have been resolved, and with great reason, that an executor, where there were debts, might sell a term; and the devisee of the term had no other remedy but against the executor to recover the value thereof, if there were sufficient assets for the payment of debts.

2. This doctrine has been carried so far, that a sale in satisfaction of a private debt of the executor has been holden good(a)(284).

But in the first authority on this head(b), it appears that the testator had been dead two years before the assignment, although that circumstance is not mentioned in the report(c); and it might, therefore, be supposed, that the executor might in that case have entitled himself to

<sup>(</sup>y) See Savage v. Humble, 1 Bro. P. C. 71; and see 17 Ves. jun. 160, 161.

<sup>(</sup>z) 2 P. Wms. 148; and see Burting v. Stonnard, 2 P. Wms. 150; and Andrew v. Wrigley, 4 Bro. C. C. 137; and Dickenson v. Lockyer, 4 Ves. jun. 36.

<sup>(</sup>a) Nugent v. Gifford, 1 Atk. 463; and Mead v. Lord Orrery, 3 Atk. 235; and see Ithell v. Beane, 1 Ves. 215.

<sup>(</sup>b) Nugent v. Gifford.

<sup>(</sup>c) See 4 Bro. C. C. 136.

the term, on account of advances made by him in his trust(d); and it also appears that he was sole residuary legatee(e). On the former ground alone, the decision perhaps cannot be supported; for Lord Thurlow decided differently in a case nearly similar, although between three and four years had elapsed from the death of the testator to the transaction (f).

With respect to the second authority on this head(g), Lord Kenyon expressly dissented from it in the case of Bonney v. Ridgard(h); and in a late case(i), where an (\*)executor, shortly after the decease of his testatrix, transferred stock, part of her estate, to his bankers, to secure a debt due from him, and future advances, the bankers swore that they did not know or suspect, that the funds were not the property of the executor, either as executor or devisee; and it appeared in evidence, that he represented himself as absolutely entitled to them, under the will, subject to a trifling annuity, and a few small legacies; although no fraud was proved, yet as gross negligence appeared in the bankers not inspecting the will, the funds were holden to be liable to the legacies given by the will.

It seems clear, therefore, that an executor cannot now dispose of his testator's property, as a security for, or in payment or satisfaction of his own debts.

In a late case, however, where a considerable time

<sup>(</sup>d) See 7 Ves. jun. 107.

<sup>(</sup>e) See 17 Ves. jun. 163.

<sup>(</sup>f) Scott v. Tyler, 2 Dick. 724; 2 Bro. C. C. 431; and see 17 Ves. jun. 164.

<sup>(</sup>g) Meade v. Lord Orrery.

<sup>(</sup>h) 2 Bro. C. C. 433; 4 Bro. C. C. 130; 7 Ves. jun. 167, cited; and see Andrew v. Wrigley, 4 Bro. C. C. 125.

<sup>(</sup>i) Hill v. Simpson, 7 Ves. jun. 152; and see Lowther v. Lowther, 13 Ves. jun. 65; 17 Ves. jun. 169; and Cubbidge v. Boatwright, 1 Russ. 549.

<sup>(\*54)</sup> 

after the death of the testator, part of the assets were pledged with bankers as a security for monies advanced at the time, and future advances to the two acting executors; a bill filed by co-executors, who had not acted in the affairs of the testator, for delivery up of the assets, was dismissed, but without deciding what the equity would be if the title was nothing more than deposit, and the bill had been filed by a legatee(k).

3. If the executor sell at an undervalue, or to one who has notice that there are no debts, or that all the debts are paid(l), or if there be any express or implied fraud or collusion between the executor and purchaser, the sale cannot be supported(m).

(\*) Fraud and covin will vitiate any transaction, and turn it to a mere color. If one concerts with an executor, or legatee, by obtaining the testator's effects at a nominal price, or at a fraudulent undervalue, or by applying the real value to the purchase of other subjects for his own behoof, or in extinguishing the private debt of the executor, or in any other manner (which Lord Eldon has said, are very material words)(n), contrary to the duty of office of executor, such concert will involve the seeming purchaser, and make him liable for the full value(o).

4. But if the legatee permit a long time to elapse without asserting his claim, and there are several mesne pur-

<sup>(</sup>k) M'Leod v. Drummond, 14 Ves. jun. 353; 17 Ves. jun. 152; and see Farr v. Newman, 4 Term Rep. 621; Keane v. Roberts, 4 Madd. 332.

<sup>(1)</sup> See Ewer v. Corbet, 2 P. Wms. 148.

<sup>(</sup>m) Crane v. Drake, 2 Vern. 616; Vin. 43, pl. 13; 18 Vin. 121, pl. 11, side notes; Bonney v. Ridgard, 2 Bro. C. C. 438, cited; Nugent v. Gifford, 1 Atk. 463; and see Gilb. Eq. Rep. 113; Prec. Cha. 434; and Whale v. Booth, 4 Term Rep. 625, n.

<sup>(</sup>n) 17 Ves. jun. 167.

<sup>(</sup>o) Per Lord Thurlow, 2 Dick. 725; and see 1 Burr. 475.

chasers, equity will not set aside the sale, although there are suspicious circumstances of fraud(p).

5. And although the legatee has only a contingent interest, yet that will be no excuse for delay(q); because he has such an interest as will entitle him to know what debts the testator owed, and what part of his estate has been applied to the payment of them. And in Howorth v. Powell, it was laid down by Lord Keeper Henley, that a party having a claim in remainder to an estate, though not to the possession, if he sees the possession wrongfully usurped, ought to file his bill for relief before his right to possession accrues: for otherwise he stands by and countenances the possessor in his exercise of acts of ownership(r).

6. It remains to observe, that Lord Hardwicke thought(s) the reversal of the case of Humble v. Bill(t) might be proper, because the charge was upon a particular (\*)part of the estate: his Lordship not, however, meaning to impugn the general doctrine, which he frequently admitted, and indeed carried farther than any

other Judge.

This distinction Lord Hardwicke appears to have been inclined to follow in a case(u) where a specific legatee of a mortgage brought a bill to foreclose against the representative of the mortgagor, who pleaded an account settled between him and the executor of the mortgagee, and

<sup>(</sup>p) Bonney v. Ridgard, 2 Bro. C. C. 438; 17 Ves. jun. 97, cited; and see 17 Ves. jun. 165.

<sup>(</sup>q) Andrew v. Wrigley, 4 Bro. C. C. 125.

<sup>(</sup>r) Ch. T. T. 1758, MS.; 1 Eden, 351, nom. Howarth v. Deem.

<sup>(</sup>s) See Mead v. Lord Orrery, 3 Atk. 241; and see 17 Ves. jun. 161, 162.

<sup>(</sup>t) Supra, p. 52.

<sup>(</sup>u) Langley v. Earl of Oxford, Ambl. 17; and see Elliott v. Merryman, Barnard. Ch. Rep. 78; and Andrew v. Wrigley, 4 Bro. C. C. 125.

<sup>(\*56)</sup> 

a release. For he thought the devisee had a specific lien on the estate, and as the mortgagor had notice of the bequest he was bound by it. And he was inclined to over-rule the plea of the release; but the case of Ewer v. Corbet(x) being cited, it was ordered to stand for an answer, with liberty to except. The case was afterwards debated on several days, and the Chancellor ultimately determined, that the plaintiff had not equity sufficient to support his bill, and accordingly dismissed it, but without costs(y).

Upon principle as well as upon the authority of Langley and Lord Oxford, the better opinion clearly is, that a particular chattel specifically bequeathed may be purchased from an executor, but certainly, in most cases, such a purchase could not be recommended without the concurrence of the legatee, because, independently of the general question, the executor may have assented to the bequest(z).

7. But of course this question cannot arise where the specific legatee of the chattel is also executor(a).

<sup>(</sup>x) Supra, p. 52.

<sup>(</sup>y) See Reg. Lib. B. 1747, fol. 300.

<sup>(</sup>z) See Thomlinson v. Smith, Rep. temp. Finch, 378.

<sup>(</sup>a) Taylor v. Hawkins, 8 Ves. jun. 209.

### (\*)CHAPTER XII.

OF THE VENDOR'S LIEN ON THE ESTATE SOLD FOR THE PURCHASE MONEY, IF NOT PAID.

- I. Where a vendor delivers possession of an estate to a purchaser, without receiving the purchase-money, equity, whether the estate bc(b)(I) or be not(c)(285) conveyed, and although there was not any special agreement for that purpose, and whether the estate be freehold or copyhold(d), gives the vendor a lien on the land for the money; (286) so, on the other hand, if the vendor cannot
- (b) Chapman v. Tanner, 1 Vern. 267; Pollexfen v. Moore, 3 Atk. 272; and see 1 Bro. C. C. 302, 424; and 6 Ves. jun. 483; Mackreth v. Symmons, 15 Ves. jun. 329.
- (c) Smith v. Hibbard, 2 Dick. 730; Charles v. Andrews, 9 Mod. 152; Topham v. Constantine, 1 Taml. 135.
  - (d) Winter v. Ld. Anson, 3 Russ. 488.
- (I) But note, that in Chapman v. Tanner (see Ambl. 726; 6 Ves. jun. 757,) and Pollexfen v. Moore, there were special agreements that the vendor should keep the writings. Indeed, in the latter case, possession had not been delivered. See Mr. Sanders's note to the case in his edition of Atkins.

<sup>(285)</sup> See MTears Les. v. Buttorf, 4 Yeates, 300. Cole v. Scott, 2 Wash. 141.

<sup>(286)</sup> See Garson v. Green, 1 Johns. Ch. Rep. 308. Gilman v. Brown, 1 Mason's Rep. 192. S. C. 4 Wheat. 255. and see note in p. 192. Irvine v. Campbell, 6 Binn. 118. Williams v. Price, 5 Munf. Rep. 507. Stouffers Les. v. Coleman, 1 Yeates, 393. White v. Casanave, 1 Har. & Johns. 106. Ridgely v. Carey, 4 Har. M'Hen. 167. (\*57)

make a title, and the purchaser has paid any part of the purchase-money, it seems that he has a lien for it on the estate, although he may have taken a distinct security for the money advanced(e)(II)(287).

And even where the agreement itself provides for the security of the purchase-money, by a bond to remain at interest during the purchaser's life, the seller will not lose (\*)his lien. The case was held not to be distinguishable from the common case of an agreement, made after the written agreement, to take a bond(f). But this point, upon the case again coming on, was decided the other way, and the lien was held not to exist(g). Upon appeal, the Lord Chancellor reversed the latter decision(h), and from his decision an appeal was lodged in the House of Lords, but it has since been withdrawn.

Upon the authority of this case, Clarke v. Royle was decided(i). There the estate was conveyed in consideration of the purchaser's covenants, and he covenanted to pay an annuity to the seller for his life; and in case he (the purchaser) married, to pay 3000l. to certain persons, in such manner as the seller should think fit; and it was held that the purchaser had no lien for the an-

- (e) Lacon v. Mertins, 3 Atk. 1. See Oxenham v. Esdaile, 2 You. & Jerv. 493, 3 You. & Jerv. 262.
  - (f) Winter v. Lord Anson, V. C. 27 Nov. 1821, MS.
  - (g) 1 Sim. & Stu. 434.
  - (h) 3 Russ. 488.
  - (i) 3 Sim. 499.

<sup>(</sup>II) As to chattels capable of delivery, as timber felled, see ex parte Gwyne, 12 Ves. jun. 379.

Hatcher v. Hatcher, i Rand. 53. Cox v. Fenwick, 3 Bibb, 183. Kennedy v. Woolfolk, 3 Hayw. 197. See contra, Wragg v. Comptroller General, 2 Des. 509.

<sup>(287)</sup> So, where the contract of sale is dissolved, the vendee has a lien on the land, for the purchase money, and interest, and also for the value of improvements. Griffith v. Depew, 3 Marsh. 179.

nuity, and that there was none for the 3,000l. The Vice-Chancellor said, that it appeared to him that Lord Eldon, in Mackreth v. Symmons, expressly over-ruled the decision in Tardiffe v. Scrugan. Besides, the case now before him was not similar to Tardiffe v. Scrugan, for in that case there was simply a bond given for the annuity; but here the parties expressly recite, that A. had agreed to convey the estates to B., in consideration of his entering into the covenant for payment of the annuity, and in consideration of his entering into the other covenant thereinafter contained. So that the release states distinctly the two circumstances that form the consideration; and then it is witnessed, that in consideration of the covenants of B., in the indenture contained, A. conveys the premises to him. And then it is further witnessed, that in pursuance of the agreement on the part of B. for entering into such covenants as aforesaid, &c. So that (\*)the deed plainly marks out that the consideration on the one side was the conveyance of the estate, and on the other the entering into the covenants. Then why was he to declare, that in respect of this annuity, and of the sum which was payable on a contingency, and which therefore never might be payable, there was to be a lien on the purchased estates? Why should he go farther than any of the cases that had been hitherto decided upon the subject of lien on purchased estates, and do that which appeared to be contrary to the intention of the parties? His Honor considered that this case was decided by the authority of Winter v. Lord Anson.

A stipulation that the purchase-money should be repaid within two years after a resale, was held to discharge the vendor's lien(k).

But equity would not raise this equitable lien in favor

<sup>(</sup>k) Ex parte Parkes, 1 Glyn & Jam. 228.

<sup>(\*59)</sup> 

of a papist incapable of purchasing (l), for that would have given him an interest in land. (288)

If a vendor take a distinct and independent security for the purchase-money, his lien on the estate is gone; such a security is evidence that he did not trust to the estate as a pledge for his money(m)(289).

Thus, upon the sale of an estate, the vendor accepted some stock for the money(n), with an agreement, that in case it did not within a limited time produce a sum named, the purchaser should make it up that sum. The stock proved deficient; and Sir William Grant held, that the vendor had no lien on the estate for the deficiency: he thought that the vendee could not have any motive for (\*) parting with his stock, but to have the absolute dominion over the land. It was impossible, his Honor said, that it could be intended that the vendor should have this

<sup>(1)</sup> Harrison v. Southcote, 2 Ves. 389. See now 10 Geo. 3.

<sup>(</sup>m) See 6 Ves. jun. 483; and see the observations of Lord Eldon on this case in 15 Ves. jun. 348, 349.

<sup>(</sup>n) Nairn v. Prowse, 6 Ves. jun. 752; but see Lord Eldon's observations, post.

<sup>(288)</sup> A court of equity will not decree a specific performance of a contract relating to lands, in favor of an alien, it being against the general policy of the law. Orr v. Hodgson, 4 Wheat. 465. But the disabilities of an alien are distinguishable from those of a papist in England. See Craig v. Leslie, 3 Wheat. 588, 589.; and see note in Jackson v. Clark, 3 Wheat. 12.

<sup>(289)</sup> See Tayloe v. Adams, Gilmer, 329. See also Brown v. Gilman, 4 Wheat. 255, 291. Cox v. Fenwick, 3 Bibb, 183. The lien of the vendor for unpaid purchase money, may be waived by the acts of the parties, shewing, that it is not intended to be retained. Brown v. Gilman, ut supra. See Garson v. Green, 1 Johns. Ch. Rep. 308. If, on a sale of land, the vendor take bonds with personal security, he loses his lien upon the land. Frances v. Huzlerigg, Hardin, 48. But it seems, that where the vendee gave a bond, with surety, for the purchase money, and received no conveyance, the vendor will not lose his lien. Hatcher v. Hatcher, 1 Rand. 53. See further, Cole v. Scott, 2 Wash. 142. Wilson v. Graham's Exr. 5 Munf. 297.

double security, an equitable mortgage and a pledge, which latter, if the stock should rise a little, would be amply sufficient to answer the purchase-money.

And the same rule must, it has been said, prevail where a vendor accepts a mortgage of another estate for the purchase-money, the obvious intention of burthening one estate being, that the other shall remain free and unincumbered(o); so, even where the vendor takes a mortgage of the estate sold for only part of the purchase-money; because, by taking a mortgage for part, he clearly evinces his election, that the estate should be charged with that part only(p)(290).

Lord Eldon, however, has said, that it did not appear to him a violent conclusion as between vendor and vendee, that notwithstanding a mortgage, the lien should subsist(q). It must not, he added, be understood, that a mortgage taken is to be considered as a conclusive ground for the inference, that a lien was not intended, as he could put many instances, that a mortgage of another estate for the purchase-money, would not be decisive evidence of an intention to give up the lien, though in the ordinary case, a man has always greater security for his money upon a mortgage, than value for his money upon a purchase; and the question must be, whether, under the circumstances of that particular case, attending to the

<sup>(</sup>o) See Nairn v. Prowse; but see 15 Ves. jun. 341; 2 Ball & Beat. 515.

<sup>(</sup>p) Bond v. Kent, 2 Vern. 281. See 1 Scho. & Lef. 135.

<sup>(</sup>q) See 15 Ves. jun, 341; and see Cowell v. Simpson, 16 Ves. jun. 278, 280.

<sup>(290)</sup> So, where it is agreed, that the lien shall be retained to a certain extent, this shall be deemed a waiver of the lien to any greater extent. Brown v. Gilman, 4 Wheat. 255, 290. And so, where a part of the purchase money is paid, the lien shall be good for the residue; and the purchaser is to be considered as a trustee for the amount unpaid. Garson v. Green, 1 Johns. Ch. Rep. 308.

worth of that very mortgage, the inference arises. In the instance of a pledge of stock, does it necessarily follow that the vendor, consulting the convenience of the purchaser, (\*)by permitting him to have the chance of the benefit, therefore gives up the lien which he has? The doctrine, as to taking a mortgage or pledge, would be carried too far, if it is understood as applicable to all cases, that a man taking one pledge, therefore necessarily gives up another, which must, his Lordship thought, be laid down upon the circumstances of each case, rather than universally (r).

A bond, and a mortgage of part of the estate, have been held to exclude the lien over the rest of the estate(s).

But it seems, that taking a covenant, bond or note, for the purchase-money, will not affect the vendor's lien(291).

This was settled by the case of Hearne v. Botelers(t), where a bond was taken for the money, and some of it remained unpaid, and the bond was lost; for the opinion of the Court was to charge the defendants, in regard of the land in their possession, with the payment thereof; on the ground, it should seem, that taking a bond did not deprive the vendor of his equitable lien; for unless he had such a lien, the loss of the bond would hardly be a ground to charge the money on the estate(u).

So, in Gibbons v. Baddall(x), it was said, that if A.

- (r) Mackreth v. Symmons, 15 Ves. jun. 348, 349.
- (s) Capper v. Spottiswoode, 1 Taml. 21.
- (t) Cary's Rep. Cha. 25; and see Tardiff v. Scrughan, 1 Bro. C. C. 422, cited; and Harrison v. Southcote, 2 Ves. 389.
  - (u) But see 15 Ves. jun. 338, 343, per Lord Eldon.
  - (x) 2 Eq. Ca. Ab. 682, n. (b) to (D.); Ex parte Peake, 1 Madd. 346.

<sup>(291)</sup> Garson v. Green, 1 Johns. Ch. Rep. 308. White v. Casanave, 1 Har. & Johns. 106. Cox v. Fenwicke, 3 Bibb. 183. Kennedy v. Woolfolk, 3 Hayw. 197. See Duval v. Bibb, 4 Hen. & Munf. 113. Stouffer's Les. v. Coleman, 1 Yeates, 393.

sells an estate, and takes a promissory note for part of the purchase-money, and then the purchaser sells to B, who has notice that A, had not received all his purchase-money, the land in equity is chargeable in the hands of B, with the money due on the note. In this case, therefore, the (\*)existence of the equitable lien was considered as a point perfectly settled.

But in Fawell v. Heelis(y), where a receipt was indorsed on the deed for the purchase-money(I), although it was not actually paid, and the vendor took a bond for the purchase-money, Lord Bathurst held that he had thereby departed with his lien. He said, he did not find an instance where a bond had been taken for the consideration-money(z). It was evident the vendor had an opinion of the purchaser at the time, otherwise he would not have let the money remain in his hands. I consider it, he added, as a transaction distinct, and independent of the purchase: he lends him the money, and he chooses his security, and I think he must abide by it; therefore let the bill be dismissed.

In a subsequent case(a), however, Lord Rosslyn was decidedly of opinion against the doctrine laid down by Lord Bathurst. After commenting on other cases, he said, the case of Fawell and Heelis remained; there Lord

(y) Ambl. 724; 1 Bro. C. C. 421, n.; 2 Dick. 485.

(z) Vide Heale v. Botelers, and Gibbons v. Baddall, ubi supra.

(a) Blackburn v. Gregson, 1 Cox, 90; 1 Bro. C. C. 420; and see Tardiffe v. Scrughan, ibid. 423, cited; and 15 Ves. jun. 336, 337.

<sup>(</sup>I) This of course could not make any difference in the case, for a receipt of the purchase-money, although signed by the seller, is in equity of no avail if the money be not actually paid. See Coppin v. Coppin, 2 P. Wms. 291; but at law the receipt cannot be got over, Rowntree v. Jacob, 2 Taunt. 141, unless merely fraudulent, Henderson v. Wild, 2 Campb. 561; see Lampon v. Corpe, 5 Barn. & Ald. 606; 1 Dowl. & Ryl. 211, S. C.; and in equity payment will be presumed after a great length of time, Bidlake v. Arundell, 1 Cha. Rep. 93.

Bathurst doubted whether there was such an equitable lien; it became, therefore, of great consequence that it should be spoken to. It struck him always, he said, that there was such a lien, and that it was so from the foundation (\*)of the court. A bargain and sale must be for money paid. If an estate is sold, and no part of the money paid, the vendee is a trustee: then, if part be paid, was it not the same as to that which was unpaid?(292)

In the late case of Nairn v. Prowse(b), the Master of the Rolls seemed to incline to the same opinion. He said, that by conveying the estate without obtaining payment, a degree of credit was necessarily given to the vendee. That credit might be given upon the confidence of the existence of such a lien. The knowledge of that might be the motive for permitting the estate to pass without payment. Then it may be argued, that taking a note or bond cannot materially vary the case. A credit is still given to him, and may be given from the same motive; not to supersede the lien, but for the purpose of ascertaining the debt, and countervailing the receipt indorsed upon the conveyance.

And in a case where a receipt was given for the whole purchase-money, but part was retained, and a promissory note given for it to a trustee for the vendor, there being debts affecting the estate, the amount of which was not ascertained, Lord Redesdale held, that it lies on the purchaser to show that the vendor agreed to rest on the collateral security; prima facie the purchase-money is a lien on the lands. In this case, he said, that the purchaser's note was nothing but a mere memorandum, put into the hands of a trustee, to enable the purchaser first to pay off incumbrances, and then to be subject to

<sup>(</sup>b) 6 Ves. jun. 752.

an account, and the balance only to be received by the vendor. It cannot be considered that the vendor relied on it as a security. Suppose bills given as part of the purchase-money, and suppose them drawn on an insolvent house, shall, his Lordship asked, the acceptance of such (\*)bills discharge the vendor's lien? They are taken, he added, not as a security, but as a mode of payment(c)(293).

And in a late case, Where the purchase-money was paid by bills drawn by the purchaser and accepted by him and his partner, payable to the seller's order, Sir Wm. Grant, Master of the Rolls, determined that the lien was not gone(d). It was insisted, that by taking bills accepted by the partnership, the vendor got the security of a third person, which must be considered as a substitution for the lien. His Honor observed, that what might be the effect of a security, properly so denominated, of a third person, had never, he believed, been absolutely determined; but he perfectly concurred in the opinion expressed by Lord Redesdale in Hughes v. Kearney(e), that bills of exchange are to be considered not as a security, but merely as a mode of payment. That is obvious from attending to the nature of a bill of exchange; it is an order by the drawer for the payment of money which he has in the hands of the drawee to the holder of that bill. The acceptor, by his acceptance, acknowledges that he has money belonging to the drawer in his hands, and engages to have that money forthcoming according to the requisition of the bill. The acceptor is never considered as a surety for the debt of another. By accepting he admits himself to be a debtor to the drawer. The subject of the bill is, in

<sup>(</sup>c) Hughes v. Kearney, 1 Scho. & Lef. 132.

<sup>(</sup>d) Grant v. Shills, 2 Ves. & Bea. 306.

<sup>(</sup>e) 1 Scho. & Lef. 132. See 136.

<sup>(293)</sup> See Garson v. Green, 1 Johns. Ch. Rep. 309.

<sup>(\*64)</sup> 

contemplation of law, the drawer's own money, which he authorizes the creditor to receive instead of receiving it himself, and afterwards handing it over to such creditor.

And in such cases it is not important that the note or bill has been negotiated (f).

(\*) The same point seems to have been decided in Comer v. Walkley(g). A trustee sold an estate for 720l.: 600l. was left in the purchaser's hands as an indemnity against an annuity; and a deed was entered into between him and the trustee, whereby he covenanted to pay interest on the 600l., and when the annuity should cease or be discharged, to pay the money to the trustee. By several conveyances, &c. the estate became again vested in trustees, upon trust to sell; and they sold the estate to a purchaser, who objected to complete his contract without the concurrence of the person entitled to the residue of the 600l. then unpaid. Two bills were filed, one by the person entitled to the residue of the 600l. against the purchaser and others, for payment of it; and the other by the purchaser, who had been in possession twenty-two years, for a specific performance, which was accordingly decreed, and his costs in both causes were allowed. The proper accounts of the personal estate were directed to be taken in the first cause, but the question, out of what estates any deficiencies should be made good, was reserved: so that it does not appear that the Court held the money to be a lien on the land any further than by giving the purchaser his costs in both causes; which circumstance alone is, however, conceived to be decisive. And the question has received the same decision in a recent case before Lord Eldon, after an elaborate review of all the authorities(h).

<sup>(</sup>f) Ex parte Loaring, 2 Rose, 79. But it is otherwise at law upon a sale of goods, Burney v. Poyntz, Nev. & Shann. 229.

<sup>(</sup>g) Reg. Lib. A. 1784, fol. 625; vide supra, p. 46.

<sup>(</sup>h) Mackreth v. Symmons, 15 Ves. jun. 329. The case was after-

Upon the whole, therefore, it seems quite clear, that taking a covenant, bond or note, for the purchase-money, or any part of it, will not discharge the vendor's equitable lien on the estate. And it seems that the same rule must (\*) prevail although the estate is sold for an annuity, and a covenant, bond or note is taking for securing the payment of it(i).

In Elliot v. Edwards(k), the vendor assigned a lease-hold estate to the purchaser, upon payment of part of the purchase-money. The purchaser, and another person as his surety,-covenanted for payment of the residue of the purchase-money; and in the assignment was contained a proviso, that the estate should not be assigned until all the money was duly paid, without the joint consent of the vendor and the surety. Lord Alvanley was of opinion, that the vendor had an equitable lien, and that till the money was paid, equity would not compel a specific performance of any agreement by the assignee for sale of the estate. But if a third person advance part of the purchase-money to the vendor, and he is in effect made a mortgagee of the estate, his right will prevail over the vendor's lien(l).

In Blackburn v. Gregson(m), Lord Rosslyn, as we have seen, said, that if an estate is sold, and no part of the money paid, the vendee is a trustee: from which it might perhaps be inferred, that a vendor has always an equitable lien where no part of the purchase-money is paid: but this cannot be considered as a general rule; it being

wards reheard by Lord Chancellor Eldon, with the assistance of two Judges, but judgment was not given.

<sup>(</sup>i) See Tardiffe v. Scrughan, 1 Bro. C. C. 423, cited; but see Mackreth v. Symmons, 15 Ves. jun. 329, which, however, was a very particular case; and see Clarke v. Royle, sup. p. 58.

<sup>(</sup>k) 3 Bos. & Pull. 181.

<sup>(1)</sup> Wood v. Pollard, 9 Price, 544.

<sup>(</sup>m) 1 Bro. C. C. 424.

<sup>(\*66)</sup> 

clear, that a vendor may depart with his lien, although no part of the purchase-money be paid. Indeed the same rules seem to prevail on this subject, whether the whole or only part of the purchase-money remains unpaid.

Where a security by bond or note is given for the purchase money, and it is intended that the vendor shall (\*)not have a lien on the estate for the money, a declaration to that effect should be inserted in the conveyance; which would effectually prevent equity from raising a lien upon the presumed intention of the parties (294)

(294) In Kauffelt v. Bower, 7 S. & R. 64, it was decided that where the conveyance was absolute and possession delivered according to the deed; and the vendee executed his bond with surety for the purchase money, there was no lien as against judgment creditors recovering their judgments subsequent to the conveyance. Gibson, J. in delivering the judgment of the court said, the doctrine of lien has never been encouraged by the legislature; but has been barely tolerated, in particular cases and under severe restrictions. Nor can I conceive how it ever came to be considered a principle of general equity any where, that a vendor, who has divested himself of every particle of right that can pass by deed, shall nevertheless have an available interest in the land. Duncan, J. observed, that "the doctrine of implied lien here is a novel one, lately imported; and opposed to the policy of our government, which is to leave this species of property, altogether free to alienation, unincumbered with secret trusts, or concealed liens. The case of Irvine et al. v. Campbell, 6 Binn. 118, very properly decided that the vendor had a lien for the purchase money; for there the instrument was denominated an article of agreement, and contained a covenant, that each party should give to the other, any further instrument of writing agreeable to law, which should be necessary for the security of either. It appeared on the face of the agreement that the money was not due until after the judgment and sale to Irvine. And in Calhoun v. Snyder, 6 Binn. 167, Yeates, J. states, that if the rule should be adopted here, that judgments bound after purchased lands, the situation of a buyer and seller would be most perilous. In this case the bond given by Bower was not what in the French law is called a priviledged obligation, for which he had a lien, on the property sold, to be paid in preference to other creditors; it was without lien, agreement, or covenant binding the land, running with it; the personal security of the obligor. Such likewise is the settled principle in South Carolina, ex parte Wragg, 2 Dess. Ch. R. 509. Cases of fraud are exceptions to the rule. VOL. II.

II. It must be remarked, that although equity raises this lien in favor of a vendor, yet it is not extended to third persons; that is, where the vendor is satisfied out of the personal estate of the purchaser, in exclusion of a third person, that person cannot resort to the equitable lien of the vendor on the estate; or, in other words, cannot require the purchased estate and the personal estate to be marshalled.

Thus, in the case of Coppin v. Coppin(n), a younger brother purchased an estate of his elder brother, but part of the purchase-money was not paid. The purchaser made his will, charging his estate with great legacies; but the will was attested by only two witnesses; afterwards the purchaser died, leaving his brother, the vendor, his heir and executor(295); and it was holden by Lord Chancellor King, that he had an equitable lien on the land; that he was entitled to retain the purchase-money out of the assets; and that the legatees could not stand in his place with respect to the equitable lien.

There is an important case on this subject, which demands particular attention. The case to which I allude is Pollexfen v. Moore(o). It appeared that Thomas Moore purchased an estate from Pollexfen, and had not paid all the purchase-money; he devised the estate to Kemp, and, subject to some legacies, made Kemp his residuary legatee and executor. Kemp wasted the personal estate and died; whereupon the purchased estate (\*)descended to Boyle Kemp, his son and heir at law. Pollexfen filed his bill for payment of the remainder of the purchase-money. Mrs. Moore, a legatee in Thomas

<sup>(</sup>n) Coppin v. Coppin, Sel. Cha. Ca. 28; 2 P. Wms. 291.

<sup>(</sup>o) 2 Atk. 272.

<sup>(295) &</sup>quot;The death of the vendee does not alter the claim;" per KENT, Chancellor. Garson v. Green, 1 Johns. Ch. Rep. 309. See Trustees of the University v. Gilmour, 2 Hayw. 129. (\*68)

Moore's will, brought a cross-bill, praying that if the purchase-money should be paid out of the personal estate, she might stand in the purchaser's place as to his lien on the land. Lord Hardwicke admitted that Pollexfen had a lien on the estate for the remainder of the purchasemoney. But he said, that this equity would not extend to a third person, but was confined to the vendor and vendee only; and if the vendor should exhaust the personal assets of Moore and Kemp, the defendant would not be entitled to stand in his place, and to come upon the purchased estate in the possession of Kemp's heir. But then the heir should not avail himself of the injustice of his father, who had wasted the assets of Moore, which should have been applied in paying the defendant's legacy. Therefore, Lord Hardwicke added, that the estate which had descended from Kemp, the executor of Moore, upon Boyle Kemp, came to him liable to the same equity as it would have been against the father, who had misapplied the personal estate; and in order to relieve Mrs. Moore, he would direct Pollexfen to take his satisfaction upon the purchased estate, because he had an equitable lien both upon the real and personal estate; and would leave this last fund open, that Mrs. Moore, who could at most be considered only as a simple-contract creditor, might have a chance of being paid out of the personal assets.

The decree was general, that the residue of the purchase-money and interest should in the first place be paid out of the personal estate of the said Thomas Moore; but that in case it should appear that Moore did not leave assets to pay what should be so due for the residue of the purchase-money, and all his other debts, legacies and (\*)funeral expences; or if the personal estate of Moore was not then sufficient, by reason that the assets of Kemp were not sufficient to answer such part thereof as came

to his hands, then such deficiency, "so far as the personal estate of the said Thomas Moore shall be applied in payment of the said purchase-money(I)," should be made good out of the purchased estate, and a competent part thereof was decreed to be sold accordingly.

Now in this case Lord Hardwicke, in giving judgment, clearly agreed with the decision in Coppin v. Coppin, that this equity did not extend to a third person. According to the judgment, his Lordship deviated from that rule in the case before him, on the ground of fraud. But Lord Hardwicke's decree cannot be satisfactorily accounted for on this narrow ground. The decree was, that if Thomas Moore (the original purchaser) did not leave assets to pay the residue of the purchase-money, and all his debts, funeral expenses, and legacies, then the purchased estate and the personal estate should be marshalled, so as to let in the simple-contract creditors and legatees. This could not be on account of the fraud in Kemp, the devisee and executor.

It appears by the Registrar's book, that Pollexfen had not delivered the title-deeds and conveyance of the estate to the purchaser, but had by agreement kept them in his own custody as a security for the purchase-money unpaid; (\*) and he strongly insisted by his bill, that he never intended the deeds to have operation till all the money

<sup>(</sup>I) The decree has generally been considered at variance with the judgment. In the first edition of this work, the author stated, that he could not see the principle upon which the decree was made, if it were correctly stated, that if the purchaser did not leave assets to pay the purchase-money, and all his debts, funeral expenses, and legacies, the deficiency was to be made good out of the purchased estate. See 3. Atk. 273, n. 3, last editon. Upon searching the Registrar's book, it appears that the decree was qualified as stated in the text; and this emendation, with the observations in the text, will, it is hoped, conduce to a right understanding of this case. See Reg. Lib. B. 1745, fol. 283.

was paid (p). And this, it is apprehended, must have been the ground on which the decree was pronounced. The seller had an equitable mortgage on the estate, and the case therefore came within the general rule, as to marshalling (q).

Thus explained, the case of Pollexfen v. Moore does not in the least clash with Coppin v. Coppin, but appears to establish an important distinction on this subject, viz. that where the purchaser has an equitable mortgage on the estate, or in case of fraud, the purchased estate and the personal estate may be marshalled in favor of simple-contract creditors and legatees.

The general question under discussion arose in a case before Lord Eldon, but it was not necessary to decide it. Pollexfen v. Moore, as reported, was the only case cited. The Lord Chancellor assimilated the lien to a charge, and said, that the cases of marshalling seem to have gone this length: that, where there is a charge upon an estate descended, a legatee shall stand in the place of the person having that charge, resorting to the personal estate. His Lordship, however, gave no opinion upon the point, although it is clear that the inclination of his opinion was in favor of the legatee under the general  $\operatorname{rule}(r)$ . In a still later case the very point came before  $\operatorname{Sir} \operatorname{Wm}$ . Grant, Master of the Rolls, and called for a decision(s). The only case cited was Pollexfen v. Moore, as reported (\*) in Atkyns. His Honor said, that it was a very obscure

<sup>(</sup>p) Reg. Lib. B. 1745, fol. 283.

<sup>(</sup>q) Lutkins v. Leigh, For. 53; Aldrich v. Cooper, 8 Ves. jun. 397.
In my copy of Forrester, Holdsworth v. Holdsworth, Hil. 23 Geo.
III. on appeal from the Rolls, is referred to; and see O'Neal v. Mead, 1 P. Wms. 693, and the cases in the note.

<sup>(</sup>r) See Austen v. Halsey, 6 Ves. jun. 475; and see Cox's n. (1) to 2 P. Wms. 295.

<sup>(</sup>s) Trimmer v. Bayne, 9 Ves. jun. 209; and see Headley v. Roadhead, Coop. 50.

report; and it had perplexed him very much formerly. The decision was against that dictum of Lord Hardwicke. This could not be distinguished from the common case of marshalling; that a, person having resort to two funds shall not by his choice disappoint another, having one only: and a decree was pronounced accordingly.

The reader will observe, that the case of Coppin v. Coppin was not cited in either of the foregoing cases; and should the observations which have been made on Pollexfen v. Moore be thought correct, it would seem that Lord Hardwicke's decision was not in opposition to his dictum in the same case, expressive of the rule established by Lord Chancellor King. Perhaps the common case of marshalling may be thought not to apply to the point in question, when it is considered that the equitable lien was originally raised by the construction of equity in favor of the vendor only, and not in favor of third persons. It seems to have been thought in Coppin v. Coppin, and apparently with some reason, that extending the vendor's lien to third persons would be breaking in upon the statute of frauds. The general rule as to marshalling applies to cases where the person resorting to the personal estate has an actual charge or lien on the real estate: but in this case, if equity first deems the purchaser a trustee for the vendor as to so much of the estate as will satisfy the purchase-money unpaid, and then permits a disappointed legatee to stand in the place of the vendor, it is creating a charge on the land in direct opposition to the statute of frauds. On sale of the estate, the purchase-money becomes a debt payable out of the purchaser's personal estate; and the equitable lien ought, it is conceived, to be extended to so much only of the purchased estate as the personal estate is insufficient to answer. The vendor has not an original charge on the (\*) estate, but only an equity to resort to it, in case the (\*72)

personal estate prove deficient. In this view of the case an independent substantive charge on the land is, in fact, created by equity in favor of a legatee, although, if the legacy was actually imposed on the estate by a will not duly executed according to the statute of frauds, the Court is bound to say, that the will cannot be read as to the charge.

It is with great deference that these observations are submitted to the reader, after the high opinions which have been given upon this point; but as the case of Coppin v. Coppin was not cited in the recent cases, and the effect of a decision over-ruling that of Lord Chancellor King, does not appear to have presented itself to the mind of the Court, it still seems open to contend, that the equity under consideration cannot be extended to a third person, unless by reason of a fraud, or on the ground of the vendor having an equitable mortgage on the estate.

Since these observations were written, Lord Eldon, in deciding the general question of lien, observed that he had some doubt upon another point, whether the Court will in case of the death of the vendee marshal the assets, so as to throw the line on the purchased estate. It has been often said, and the case of Coppin v. Coppin stated as an authority, that a Court will not do that. The Lord Chancellor in his judgment takes no notice of that point. In that case the heir happened to be the heir of the vendee, so that the estate was at home, and it was held that being also the executor, he was entitled to retain the purchase-money out of the personal assets. That decision requires a good deal of consideration. If the estate had been in a third person, the general doctrine as to a person having two funds to resort to, might be thought to have an immediate application, and the express terms (\*) of the decree in Pollexfen v. Moore might be found very

inconsistent with it(t). On a subsequent occasion, Lord Eldon observed (in allusion to Lord Hardwicke's observation in Pollexfen v. Moore, before noticed), that if the meaning was that he (Lord H.) would follow the case of Coppin v. Coppin, and that if the vendor exhausted the personal assets, the legatee of the purchaser should not come upon the estate, there is great difficulty in applying the principle, as it would then be in the power of the vendor to administer the assets as he pleases: having a lien upon the real estate to exhaust the personal assets, and disappoint all the creditors; who, if he had resorted to his lien, would have been satisfied, and in that respect, with reference to the principle, the case is anomalous(u).

In the late case of Selby v. Selby, the Master of the Rolls decided that the assets should be marshalled against the devisee in favor of simple-contract creditors (x)(296).

- (t) 15 Ves. jun. 338, 339.
- (u) 15 Ves. jun. 345.
- (x) 4 Russ. 336.

As, in Gridley & ux. v. Andrews & al. 8 Conn. R. 1, where the testator after several legacies to his daughters to be paid in one year after his death, gave the residue of his estate to his son. At the time of making his will he had ample personal estate to pay all debts and legacies; but when he died, his personal effects were only sufficient to pay the debts, &c. without the legacies. The testator, however, had purchased \$4,000 worth of real estate, which he paid for out of the personal estate; and this between the making of the will and his death; but a share of this latter estate descended to the plaintiff, as heir at law. And the question in the case was, whether the plaintiff as legatee was entitled to payment of the legacy out of the real estate; and held, that the legacies were not a charge on the real estate. Bissel, J. The intent of the testator is to prevail; but no rule is better

<sup>(296)</sup> Pecuniary Legacies are not a charge upon the lands, as against a residuary devisee, unless such an intention be clearly expressed by the testator.

III. The observation of Lord Hardwicke before noticed, that this equity would not extend to a third person, but was confined to the vendor and vendee only, is frequently adduced to prove, that the lien does not exist when the estate passes into the hands of a third person; but by the latter part of the same passage(y), it clearly appears, that this was not Lord Hardwicke's meaning; and in Walker v. Preswick(z) Lord Hardwicke said, that this lien prevailed against the purchaser, his heir, or any claiming under him, with notice of this equitable title; which evinces his meaning to be, that the purchased estate, and the personal estate of the purchaser, could not be marshalled in favor of a third person, although, as we have

- (y) Vide supra, p. 68.
- (z) 2 Ves. 622.

established than that pecuniary legacies are never to be a charge on real estate, unless such intention be clearly expressed by the testator. In Swift v. Edson, 5 ib. 532, the testator gave pecuniary to a large amount, and expressly directed the legacies to be paid; and there was a devise over of the residue of her estate. When the will was made she had sufficient personal estate to pay all debts and legacies; but by the foreclosure of mortgages in her life time the personal was converted into real estate; and the prayer was that the real estate obtained by such foreclosures might be applied to the payment of the legacies. The C. J. there recognised the distinction between a charge upon the realty, whether it be for the payment of the debts and legacies. In respect to the latter, he said, 'there must be a clear, manifest intention that the heir or devisee shall take subject to the legacies;'—and the bill with respect to that relief was dismissed.

So, in Tole & ux. v. Hardy, 6 Cowen, 333, where the words were:—"I give to W. H. (defendant) all my estate that I now live on, which shall be his forever; and he is to pay Mrs. Tole \$100. Defendant being one of the executors said he would pay the legacies, if the widow would release her dower, &c., which she did. The action was assumpsit for the legacy; and the question was whether the legacy was a charge on the land? The court held, that it did not clearly appear that this legacy was to be a specific charge on the land to the exclusion of the personal property from coming in aid of the real.

(\*)seen, he called it in Pollexfen v. Moore, by reason of the equitable mortgage.

It appears then, that this equitable lien prevails against the purchaser and his heir, and all persons claiming under him with notice, although for valuable consideration (a)(297).

But it of course would not prevail against a bonu fide purchaser without notice: and the mere deduction of the title to the estate from the first vendor by recital, will not be sufficient to affect him, for that does not show it was not paid for(b)(298).

Persons coming in under the purchaser by act of law, as assignees of a bankrupt(c), are bound by an equitable lien, although they had no notice of its existence; because, as Sir William Grant observed on another point, the assignment from the commissioners, like any other assignment by operation of law, passes the rights of a bankrupt precisely in the same plight and condition as he possessed them. Even where (as in this instance) a complete legal title vests in them, and there is notice of an equity affecting it, they take, subject to whatever equity the bankrupt was liable to(d).

In some cases by force of the seller's lien, the Court can at once sell the estate and pay the purchase-money to the seller (e).

But where a trustee for infants, to sell the lease of a

- (a) Hearle v. Botelers, Cary's Cha. Rep. 25; Walker v. Preswick,
  2 Ves. 622; Gibbons v. Baddall, 2 Eq. Ca. Abr. 682, n. (b) to (D);
  Elliot v. Edwards, 3 Bos. & Pull. 181; Mackreth v. Symmons, 15
  Ves. jun. 329.
  - (b) See 1 Bro. C. C. 302.
- (c) Blackburne v. Gregson, 1 Bro. C. C. 420; Bowles v. Rogers, 6 Ves. jun. 95, n. (a); Ex parte Hanson, 12 Ves. jun. 346.
  - (d) See 9 Ves. jun. 100; 2 Ves. & Bea. 309.
  - (e) Supra, Vol. 1, p. 439.

<sup>(297)</sup> See Irvine v. Campbell, 6 Binn. 118. Cole v. Scott, 2 Wash. 142. Stouffer's Les. v. Coleman, 1 Yeates, 393.

<sup>(298)</sup> See Irvine v. Campbell, 6 Binn. 118.

<sup>(471)</sup> 

brewhouse, plant and fixtures, contracted to sell them and let the purchaser into possession, and upon a bill filed by (\*)the trustee there was a decree for a specific performance, but the purchaser became bankrupt before the money was paid, the Vice-Chancellor held that there was no lien against the plant, which fell within the provision of the 21 Jac. 1. c. 19(f).

And creditors claiming under a conveyance from the purchaser, are bound in like manner as assignees(g), because they stand in the same situation as creditors under a commission.

In Nairn v. Prowse(h) the question arose, whether the lien of which we are now treating, should prevail against an equitable mortgage, by deposit of title-deeds; but the case went off on another ground, and the point was not decided. In Stanhope v. Earl Verney(i), Lord Northington held, that a declaration of trust of a term in favor of a person, was tantamount to an actual assignment; unless a subsequent incumbrancer, bona fide, and without notice, procured an assignment; and that the custody of the deeds respecting the term, with a declaration of the trust of it in favor of a second incumbrancer, was equivalent to an actual assignment of it; and therefore gave him an advantage over the first incumbrancer, which equity would not take from him(299).

Now it must at one view be seen how strong the analogy is between the point in question and this case. The only difference between them appears to be, that in the case before Lord Northington, both the trusts were de-

<sup>(</sup>f) Ex parte Dale, 1 Buck, 365.

<sup>(</sup>g) Fawell v. Heelis, Ambl. 724; and see 1 Bro. C. C. 302.

<sup>(</sup>h) 6 Ves. jun. 752; see 2 Ves. & Bea. 149.

<sup>(</sup>i) Butler's note, (1) to Co. Litt. 290 b, Ch. July 27, 1761; see and consider Frere v. Moore, 8 Price, 475.

<sup>(299)</sup> See Brown v. Gilman, 4 Wheat. 290.

clared by the parties; whereas in the case under consideration, the trust or lien is raised by equity, and not by express declaration, and the trust or equitable mortgage (\*)is generally created by the declaration of the parties; which circumstance, if it turn the scale either way, is certainly in favor of the mortgagee: so that, upon the authority of this case, we may perhaps venture to say, that an equitable mortgage, by deposit of deeds to a person, bona fide, and without notice, will give him a preferable equity, and will overreach the vendor's equitable lien on the estate for any part of the purchase-money(k).

A deposit of title-deeds by a simple-contract debtor of the Crown, for securing part of the purchase-money for another estate, binds the Crown as an equitable mortgage, although the purchaser also give his bond to the seller

for the money (l).

Before closing this subject it may be observed, that if a purchaser deposit the deeds with a third person, as a collateral security for part of the purchase-money, the seller, although he obtain possession of the conveyance to him from the depositary, and pledge it to persons who advance money upon it bona fide, cannot give them a lien beyond the amount of the purchase-money actually unpaid (m)(300).

<sup>(</sup>k) In Mackreth v. Symmons, 15 Ves. jun. 329, there was no deposit of the deeds.

<sup>(1)</sup> Casberd v. Ward, 6 Price, 411; Fector v. Philpott, 12 Price, 197. (m) Hooper v. Ramsbottom, 4 Camp. Ca. 121; 6 Taunt. 12; Harrington v. Price, 3 Barn. & Adolph. 170.

<sup>(300) &</sup>quot;By the English laws, the real estate can never be charged for the debts of the testator, nor in any manner taken from the heir, unless the will be attested by three or more witnesses. The provisions of our statute are substantially the same. The devise of lands, mentioned in our statute of wills, must include all charges on lands by last will. By the statutes regulating intestate estates, all the lands of the deceas-

ed, which have not been legally devised, descend to his heirs. If therefore a charge for the payment of legacies is not virtually a devise of the land, it will have no effect in any case against the heir. It is true that the statute for the settlement of the estates of persons deceased, authorises a sale of the real estate, when the goods and chattels are not sufficient, to pay the just debts of the deceased, and the legacies bequeathed in his last will and testament. But the words of this statute may be fully satisfied, if its provisions are confined to such legacies as were by law payable out of the real estate. This is the case with all legacies given in a will, which is executed in the manner prescribed for devising real estate: and this being the case which would most commonly occur, we may presume it to have been in the view of the legislature, in passing the last mentioned statute. By the statute of wills, no instrument can be approved as a testament of personal estate only, if it purports to dispose also of real estate. The statute for the settlement of the estates of persons deceased provides that the real estate of every testator or intestate shall be liable to be taken in execution by the creditors of the deceased. But we find no such provision in favor of legatees; although the latter are allowed to sue for their legacies, by an action at common law against the executor. Per Jackson, J. in Winslow et al. executors, &c., 14 Mass. 422.

In the above case, the question arose upon the approval of a codicil attested by two witnesses only, when it was admitted that the testatrix had some real estate, which would pass by the residuary clause in the will. It was disallowed in the probate court, for the reason that the codicil not being signed by three witnesses, it could not revoke nor alter that devise in the will. But the court on appeal allowed and approved the codicil; but added 'if it should hereafter appear, that the legacies given by the codicil cannot be paid, without disposing of some part of the real estate, which had before been devised by the will; the question, whether the real estate can be taken for the purpose, will come more properly before the court. We give no opinion at present, whether the will in this case created a virtual charge on the land, for the legacies therein bequeathed; and whether the legacies in the codicil come in under the same charge, according to the principle laid down in the case of Windham v. Chetwynd, 1 Bur. 423: 1 P. Wms. 421, Masters r. Masters.

'At common law the lands of a testator are not assets in the hands of the heirs, for the payment of any but specialty debts, where the heir is expressly bound by the contract. And his lands are not bound for the payment of any of his debts in the hands of a devisee, unless charged by the testator, either generally or specially, in his will. Since

the st. of 3 & 4 W. & M. c. 14. was passed, by which the lands in the hands of a devisee are made assets for the payment of debts due on specialties, all the lands of the testator, whether they descend or are devised, are chargedby law with the payment of creditors by specialty; who may also resort to the personal estate. But creditors by simple contract can avail themselves only of the personal estate, and such of the lands as are charged in the will with the payment of debts; unless when they take the place of creditors by specialty, who have been paid out of the personal estate. These rights of the creditors remain uncontrolled by any provisions which a testator can make. But as between legatees and devisees who claim under the will, and the heirs who can take only what the testator has not given away, he may regulate the funds, out of which his debts shall be paid: by which regulations they will be bound.

'In this commonwealth all the personal estate of the testator, and all the real estate, of which he died seised, whether devised or not, are assets for the payment of all his debts, whether due by simple contract or by specialty. Also by the st. of 1783 c. 24, s. 10, all estate real or personal, undevised in any will, shall be distributed as if it were intestate, and the executor shall administer upon it as such.' Again, 'it is manifest that a testator cannot, by any dispositions in his will, affect the rights of creditors: -but he may bind, by his disposition, his legatees, devisees and heirs.' Again, 'the testator cannot charge with the payment of his debts after purchased lands, any more than he can devise them." Accordingly in Hays & al. v. Jackson & al., 6 Mass. 149, the court ordered the executors to take the lands which were not specifically devised, and then such as descended to the heirs and sell the same for the payment of the debts; for when the testator, or the law has appropriated an adequate fund to pay the debts, it would be unreasonable for the court to let that fund lie by, and to license an executor to sell a specific devise.

'There seems to be no reason or authority for holding that lands specifically devised are liable to be sold for the payment of specific legacies. The most that legatees can claim is, that they should be put on an equal footing with the devisees: and that the latter, in case of a deficiency of assets, should be held to contribute.' Per Wilde, J. 9 Pick. 561.

Mr. J. Story in Gardner v. Gardner, 4 Mason, 215, recognizes the doctrine laid down by Lord Eldon, 'that where a man, by deed or will, charges or orders an estate to be sold for the payments of debts generally, and then makes specific dispositions, the purchaser is not bound to see to the application of the purchase money.' He adds 'I agree to the doctrine, in cases of a general charge of debts, that the purchaser

need not look to the application, if he has bona fide paid the same. When he once has paid in good faith into the hands of the devisee he is exonerated. But he is not at liberty to assist in its misapplication; he is not to buy the trust property in payment of antecedent debts, or to aid the devisee in diverting the fund from its proper uses; and if he does, a court of equity will fasten on the estate in his hands the original charge, which he has attempted to displace. And where debts are payable out of an estate, they are a charge upon the estate. Livingston v. The executors of Livingston, 3 Johns. 189; Jackson v. Harris, 8 Johns. 141; Jackson v. Bull, 10 ib. 148; and Jackson v. Martin, 18 ib. 31, tend to confirm this principle.

# (\*)CHAPTER XIII.

OF THE CONSTRUCTION OF COVENANTS FOR TITLE.

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#### SECTION I.

Where they run with the land.

In a preceding chapter we have seen to what covenants a purchaser is  $\operatorname{entitled}(a)$ ; and we are now to consider the construction of covenants entered into by a vendor.

Covenants for title are termed real covenants, and pass to the assignees of the land by the common law, who may maintain actions upon them against the vendor and his real and personal representatives (b)(I)(301). And as

(a) Ch. 9.

(b) Middlemore v. Goodale, 1 Ro. Abr. 521, (K.) pl. 6; Cro. Car. 503. 505; Sir Wm. Jones, 406; Campbell v. Lewis, 3 Barn. & Ald. 392; Lewis v. Campbell, 8 Taunt. 715.

<sup>(</sup>I) A respectable writer has observed, that cestuis que use are grantees within the statute 32 Hen. VIII. c. 34; and are therefore entitled to the benefit of all covenants entered into by persons selling lands, for securing the title of such lands, 4 Cruise's Dig. p. 80, s. 44. The statute of Henry, however, appears to relate only to covenants which are a charge upon or incident to reversions; and a purchaser of a reversion

<sup>(301)</sup> See M'Crady v. Brisbane, 1 Nott & M'Cord, 104. Harrison v. Sampson, 2 Wash. 155. Woodford's heir v. Pendleton, 1 Hen. & Munf. 303. Capel v. Bull, 17 Mass. Rep. 213. Mitchell v. Warner, 5 Conn. Rep. 497.

the covenants relate to the land, it seems that an assignee may maintain an action on the covenants, although the (\*)covenants were entered into with the original grantee and his heirs only(c)(302); and the right of action, even for a breach in the ancestor's life-time, will descend to the heir, and not to the executor, where no actual damage was sustained by the ancestor(d)(303). So covenant will lie

is under this act clearly entitled to the benefit of covenants entered into by a lessee with the vendor, although the estate is vested in him by way of use under the statute of uses; because this last statute puts him in the place of his feoffee. Lee v. Arnold, 4 Leo. 27; S. C. Mo. 97, nom. Appowel v. Monnoux; Roll v. Osborne, Mo. 859. Where an estate is upon a purchase conveyed to A. to uses, the covenants for title ought to be entered into with A. The statute of uses will of course turn the uses into possessions, and the cestuis que trust will then be deemed assignees, and may take advantage of the covenants by force of the common law, just as if the statute of uses had not been passed, and the estate had been conveyed to them at once by A. This, therefore, appears to be wholly independent of the statute of 32 Hen. VIII.

<sup>(</sup>c) Co. Litt. 884 b; 385 a; Spencer's case, 5 Rep. 16; Bally v. Wells, 3 Wils. 25; Tatem v. Chaplin, 2 H. Blackst. 133.

<sup>(</sup>d) Kingdon v. Nottle, 1 Mau. & Selw. 355; King v. Jones, 5 Taunt. 418; 1 Marsh. 107; 4 Mau. & Selw. 188.

<sup>(302)</sup> See Lienow v. Ellis, 6 Mass. Rep. 331.

<sup>(303)</sup> See contra, Hamilton v. Wilson, 4 Johns. Rep. 72. This was an action for a breach of the covenant of seisin in a deed, brought by the heir of the grantee against the grantor, for a breach in the lifetime of the ancestor; and it was held, that the action was not sustainable. This decision rests upon the ground, that, as there was a failure of title, the covenant was broken immediately on the execution of the deed, and that the grantee had an immediate and perfect right of action in his life-time, which went to his personal representatives, and could not descend to the heir. In strict analogy to this principle, it has been decided, that the assignee of a grantee cannot maintain an action against the grantor, for a breach of the covenant of seisin; because if the grantor has no title, the covenant is broken immediately, and the breach is a mere chose in action, which is incapable of assignment. Greenby v. Wilcocks, 2 Johns. Rep. 1. Mitchell v. Warner, 5 Conn.

by the devisee of lands in fee, though broken in the testator's life-time (304). For the covenant passes with the land to the devisee, and is broken in the time of the devisee; for so long as the seller has not a good title there is a continuing breach. And it is not like a covenant to do an act of solitary performance, which not being done, the covenant is broken once for all, but is in the nature of a covenant to do a thing toties quoties, as the exigency of the case may require (e).

And as covenants entered into by a vendor with a purchaser run with the land in the possession of his representatives or assignees, so on the other hand covenants entered into by a purchaser with the vendor, respecting the land, will also run with the land, and charge the representatives or assignees of the purchaser in respect of it.

It is not, however, sufficient that a covenant is concerning the land; but in order to make it run with the land, there must be a privity of estate between the covenanting parties (f). Therefore, it seems that if the estate was, (\*) at the time of the conveyance, mortgaged in fee, and the purchaser should enter into a covenant respecting the land with the vendor, the covenant would not bind the assignees of the land, but would be a mere covenant in gross; for the vendor would, in contemplation of law,

<sup>(</sup>e) Kingdon v. Nottle, 4 Mau. & Selw. 53.

<sup>(</sup>f) Per Lord Kenyon, Webb v. Russell, 3 Term Rep. 393; Stokes v. Russell, ibid. 678; affirmed in the Exchequer Chamber, 1 H. Blackst. 362; see 3 Barn. & Adolph. 591.

Rep. 497. Bickford v. Page, 2 Mass. Rep. 455. See farther, Marston v. Hobbs, 2 Mass. Rep. 433. Bennett v. Irwin, 3 Johns. Rep. 365. Pollard v. Dwight, 4 Cranch, 430. Mitchell v. Hazen, 4 Conn. Rep. 495. Davis v. Lyman, 6 Conn. Rep. —

<sup>(304)</sup> See Mitchell v. Warner, 5 Conn. Rep. 506. Per HOSMER, Ch. J.

<sup>(\*79)</sup> 

be a mere stranger, and consequently there could be no privity of estate between him and the purchaser (305).

And even where there is a privity of estate at the time of the covenant, yet if a subsequent purchaser do not take the estate of the original purchaser, he will not be bound by the covenant. It seems difficult to conceive that this case can exist. It occurred, however, in the late case of Roach v. Wadham(g); an estate was conveyed to such uses as the purchaser should appoint; and in default of appointment, to himself in fee, yielding and paying to the vendors, their heirs and assigns, a perpetual fee-farm rent, which rent the purchaser, for himself, his heirs and assigns, covenanted to pay; the estate was afterwards conveyed to a purchaser; and as it was holden that the purchaser was in under the power, and not by virtue of the first purchaser's estate, it was admitted, onall hands, that an action brought against him by the original vendor, for the fee-farm rent, was not maintainable, for he had not the estate of the first purchaser, but took as if the original conveyance had been made to himself. This decision leads to the observation, that wherever a purchaser is to enter into a covenant, which it is intended shall run with the land, the vendor ought to insist upon the purchaser taking a conveyance in fee, and should. not permit the estate to be limited to the usual uses to bar dower.

The proposition before stated, that it is not sufficient that a covenant is concerning the land, but, in order to (\*)make it run with the land, there must be a privity of estate between the covenanting parties, seems to apply as

<sup>(</sup>g) 6 East, 289.

<sup>(305)</sup> See Nesbit v. Nesbit, Cam. & Nor. 318, 324. Mitchell v. Warner, 5 Con. Rep. 497. Lienow v. Ellis, 6 Mass. Rep. 332. Dunbar v. Jumper, Assignee of Thompson, 1 Yeates, 74.

well to covenants entered into by a vendor, as to covenants entered into by a purchaser. But the consequences of this doctrine are truly alarming. In a great proportion of cases, the vendor has either mortgaged the estate in fee, or is a mere cestui que trust; and if his covenants were to be deemed covenants in gross, the assignees of the land could only compel performance of the covenants by the circuitous mode of using the name of the first purchaser or his representatives, whom at the distance of some years it might be very difficult to trace.

It seems impossible to get over the objection, by the form of the covenant; for although the vendor covenant with the purchaser, his heirs and assigns, yet the assignee of the lands will not be entitled to the benefit of the covenant, unless it run with the land under the general rule of law(h)(306). The only mode by which the difficulty can be avoided is, to require the vendor to take a conveyance to himself in fee, or to the usual uses to bar dower, previously to executing a conveyance to the purchaser; and this, I believe, has been sometimes done since it was first suggested in this work. If, indeed, the objection should be thought to exist, it might also be thought, that where the vendor conveys the estate to the purchaser under the usual power of appointment, the covenants will not run with the land: but this, it is conceived, would be carrying the rule much too far; and there seems to be some ground to contend, that even in Roach v. Wadham, as the power was coupled with an interest, the second purchaser might have been held to have come in under, and to stand in the place of the first purchaser, so as to satisfy the rule of law, although he did not actually, as it was

<sup>(</sup>h) See Tempest's case, Clayt. 60; and see Palm. 558, and Roach v. Wadham, ubi sup.

<sup>(306)</sup> See Greenby v. Wilcocks, 2 Johns. Rep. 4, 5.

(\*)determined, take the estate of the first purchaser(i). The point, however, was considered as clear, and was not discussed either at the bar or upon the bench(I).

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### SECTION II.

# Of their general Construction.

It hath already been observed (k), that the covenants usually entered into by a vendor seised of the inheritance, are, 1st, that he is seised in fee: 2dly, that he has power to convey: 3dly, for quiet enjoyment by the purchaser, his heirs and assigns: 4thly, that the land shall be holden free from incumbrances: and lastly, for further assurance.

The five covenants are several and distinct, but the first and second of them are synonymous; for if a man be seised in fee, he has power to sell(l). But the converse of this proposition is not universally true(m).

A man having merely a power to appoint an estate,

- (i) See and consider Co. Litt. 215 b. s. 10; Glover v. Cope, 1 Show. 284; Hurd v. Fletcher, Dougl. 43; Duke of Marlborough v. Lord Godolphin, 2 Ves. 61; and see 3 Wills. 26, at the bottom.
  - (k) Supra, ch. 9.
- (1) Nervin v. Munns, 3 Lev. 47; Browning v. Wright, 2 Bos. & Pull. 13.
  - (m) See 4 Cruise's Dig. 78, s. 30.

<sup>(</sup>I) As the case of the Duke of Bedford v. the Trustees of the British Museum, which contains some important doctrine on this head, has not been reported, I have extracted the material points from the briefs and shorthand writer's notes. App. No. 22.

cannot be said to be seised in fee of the estate, although he has a right to convey: and accordingly, in cases of this nature, it is usual to omit the first covenant, and to insert a covenant that the power was well created, and is not suspended or extinguished.

(\*)Covenants for title are either general and unlimited, extending to the acts of all the world, or limited and restricted to the acts of certain persons named in the deed; and under this branch of our subject we may consider, 1st, to what and against whose acts general and limited covenants extend: 2dly, in what cases restrictive words shall or shall not extend to all the covenants in the deed: and 3dly, to what remedy a purchaser is entitled under covenants for the title, in case he is evicted, or the title prove bad.

- I. First then, 1. Although covenants are general and unlimited, and are not restricted to the acts of persons claiming lawfully, yet it is now, perhaps, settled (n), although the contrary was formerly holden (o), that such a covenant shall not extend to a tortious eviction, but to evictions by title only (307); because the law itself de-
- (n) Dudley v. Foliott, 3 Term Rep. 584. See Dy. 238 a, marg.; and Crosse v. Young, 2 Show. 425, and the cases cited in the note to 3 Term Rep. 587; in some of which, however, the point was not decided, but a distinction was taken between express and implied covenants.
- (o) Mountford v. Catesby, Dy. 328 a. See 1 Ro. Abr. 430, pl. 12; Shep. Touch. 166, 170; Anon. 1 Freem. 450, pl. 612; Anon. 2 Ventr. 46; Anon. Loft. 460.

<sup>(307)</sup> See Greenby v. Wilcocks, 2 Johns. Rep. 4. Vanderkarr v. Vanderkarr, 11 Johns. Rep. 122. Kent v. Welch, 7 Johns. Rep. 258. Foillard v. Wallace, 2 Johns. Rep. 395. Sedgwick v. Hollenback, 7 Johns. Rep. 376. Twanley v. Henley, 4 Mass. Rep. 442. Marston v. Hobbs, 2 Mass. Rep. 433. Bearce v. Jackson, 4 Mass. Rep. 408. Hamilton v. Cutts, 4 Mass. Rep. 349. Duvall v. Craig, 2 Wheat. 45, 61. Pringle v. Wittens' Exr's. 1 Bay. 254. Yancy v. Lewis, 4 Hen. & Munf. 390. Mitchell v. Warner, 5 Conn. Rep. 497. Ker v. Shaw, 13 Johns. Rep. 236.

fends every one against a wrongful entry; and, therefore, if a purchaser be disturbed in his possession by a person having no title, he has a remedy at law against the wrong doer; and if he be legally evicted, he may recover against the vendor, in an action on the covenant. Lord C. J. Vaughan(p) adduces the four following reasons why the covenants should not extend to tortious evictions: 1. It is unreasonable, as the vendor cannot prevent the entry; 2. the vendee has his remedy against the wrong-doer, and therefore ought not to charge an innocent person; 3. the vendee would have a double remedy for the same injury; (\*)4. it might open a door to fraud, for the purchaser might secretly procure a stranger to make a tortious entry, that he might charge the covenantor with an action. And there is a case in the year-books in the reign of Hen. 8. where the question was, whether a general covenant in a lease should extend to an eviction by one who had no right. Englefield said, that he should not have a writ of covenant against his lessor when he is ousted by tort, for there is no mischief, because he may have a writ of trespass, or an ejectione firmæ against the person who ousted him; but if he was ousted by one who had a title paramount against whom he could have no relief, then he may have a writ of covenant against his lessor, Quod fuit concessum per plusieurs(q).

2. But where a vendor covenants to indemnify a purchaser against a particular person by name, there the covenant shall extend to an entry by that person, be it by *droit* or *tort*, for it is to be presumed that such person had an interest(r).

<sup>(</sup>p) Vaugh. 122.

<sup>(</sup>q) T. 26 H. 8, pl. 11.

<sup>(</sup>r) Foster v. Mapes, Cro. Eliz. 212; Hob. 35; 1 Ro. Abr, 430, pl.
13. See Hayes v. Bickerstaff, Vaugh. 118; Nash v. Palmer, 5 Mau. & Selw. 374. Fowle v. Welsh, 1 Barn. & Cress. 29; 2 Dowl. & Ryl.
133.

- 3. And where the covenantor himself does any act asserting a title, it will be a breach of the covenant, although he covenanted against lawful disturbances only, and the act done by him was tortious, and might be the subject of an action of trespass(s)(308). The contrary, however, was formerly holden(t). It must, nevertheless, be an act asserting a title; therefore, if the seller went on the estate to sport, the purchaser could not maintain covenant(u).
- (\*)4. So a covenant against all claiming or pretending to claim any right extends to a tortious eviction(v).
- 5. And whatever opinion may anciently have been entertained(x), yet it is now clear, that a suit in equity, by which the purchaser is disturbed, is within a covenant for quiet enjoyment against disturbances generally (y). It is, however, customary to expressly extend covenants for title to equitable charges, disturbances, &c.
- 6. In a case where the seller covenanted generally that he was seised in fee, without any condition, &c. or any other estate, matter, cause, restraint, or thing whatsoever, whereby to alter, bar, change, charge, burthen, impeach, incumber or determine the same, and had good right to convey the same; it appeared that the lady of the manor had actually demised a small part of the land sold for ninety-nine years, determinable on lives, and the lessees had entered and continued to enjoy the estates. It was

<sup>(</sup>s) Lloyd v. Tomkies, 1 Term Rep. 671; Crosse v. Young, 2 Show. 425; S. C. MS.

<sup>(</sup>t) Davie v. Sacheverell, 1 Ro. Abr. 429, pl. 7.

<sup>(</sup>u) See Seddon v. Senate, 13 East, 72.

<sup>(</sup>v) Chaplain v. Southgate, 10 Mod. 384; Com. 230; Perry v. Edwards, 1 Str. 400.

<sup>(</sup>x) Selby v. Chute, Mo. 859; 1 Brownl. 23; Wince, 116; 1 Ro. Abr. 430, p. 15; and see 3 Leo. 71, pl. 109.

<sup>(</sup>y) Calthorp v. Hayton, 2 Mod. 54; Hunt v. Danvers, T. Raym. 370.

<sup>(308)</sup> See Sedgwick v. Hollenback, 7 Johns. Rep. 376.

<sup>(\*84)</sup> 

held that the lease was made by mistake, and did not amount to a disseisin, and that the covenant did not extend to the leases. It was asked, what can a man be supposed to covenant against beyond the validity of the title? and most assuredly not against these surreptitious pocket leases. The action of covenant, it was added, only extended to the consequence of legal acts, and the reason is to be found in the case of Hayes v. Bickerstaff, that the law shall never judge that a man covenants against the wrongful acts of strangers(z).

It will be observed, that the leases were accompanied with actual possession by the lessees, who had expended (\*)money on the property. They were therefore within the covenant, and unless the covenants were held to extend to them, general covenants for title would be waste paper.—They are always intended to guard against a title adverse to the covenantor's, although it may not be a lawful title. Clearly the leases were a charge on the property at the time of the conveyance, and an ejectment at all events was necessary to dispossess the lessees. They therefore were an incumbrance within the covenant. It is not like the case of interruptions by persons not claiming lawfully subsequently to the conveyance.

7. A covenant for right to convey extends not only to the title of the covenantor, but also to his capacity to grant the estate. Therefore, where, upon a conveyance by a man and his wife, the husband covenanted that they had good right to convey the lands, and the wife was under age, the covenant was adjudged to be broken(a).

In respect to the persons against whose acts limited covenants will extend, it seems that,

- 1. A covenant for quiet enjoyment against A. and any
- (z) Jerritt v. Weare, 3 Price, 575.
- (a) Nash v. Ashton, Sir Tho. Jones, 195.

other person by his means, title or procurement, is broken by the entry of a person in whose name A, purchased jointly with his own name(b).

- 2. In this case Mr. Justice Doddridge put many cases. If a tenant in tail to whom the estate-tail was made, makes an estate and covenants as before, and the issue ousts the covenantee, the covenant is broken, because, being his purchase, the descent to his issue is by his means, although not by his title. But if the issue make an estate and covenant, and the issue of the issue enter, it is not broken, because they are not in by his means, but (\*) by descent. But if there be a lessee for life, remainder over, and the lessee make an estate and covenant, and die, and he in remainder enter, it is not broken, because he is in by the feoffor, not by the lessee. But if a man enfeoff upon condition to be enfeoffed for life, remainder over, there it shall be otherwise, because by his procurement and means; et sic de similibus.
- 3. So if A covenant for quiet enjoyment against all claiming by, from or under him, a claim of dower by his wife is within the covenant; but otherwise, if the mother of A claim her dower, because she does not claim by, from or under  $him(\epsilon)$ .
- 4. A covenant for quiet enjoyment against A., or any person claiming under him, extends to a person deriving title under an appointment made by A., by virtue of a power, in the creation of which he concurred, although the estate did not move from A., and the estate of the appointee is, according to the general rule, considered as limited to him by the deed creating the power.

This was settled in the case of Hurd v. Fletcher(d).

 <sup>(</sup>b) Butler v. Swinnerton, Palm. 339; Cro. Jac. 657. Spencer v.
 Marriott, 1 Barn. & Cress. 457; 2 Dowl. & Ryl. 665. S. C.

<sup>(</sup>c) Godb. 333; Palm. 340.

<sup>(</sup>d) Dougl. 43; see Evans v. Vaughan, 4 Barn. & Cress. 261; 6 Dowl. & Ryl. 349.

<sup>(\*86)</sup> 

Sir John Astley and his wife levied a fine of her estate to the use of Sir John for life, with power of leasing; remainders over, with a joint power of revocation to Sir John and Lady Astley. They exercised this power, and, subject to the husband's life-estate, and power of leasing and other uses, which afterwards determined, limited the estate to Lord Tankerville in tail. Sir John afterwards granted a lease not warranted by the power, and covenanted for quiet enjoyment by the lessee, without any interruption by him, or any person or persons claiming, or to claim by, from or under him. Lord Tankerville's remainder in tail having fallen into possession, he evicted the lessee on account of the defective execution of the (\*)power, whereupon the lessee brought an action against Sir John's executors; and it was holden, that Sir John was a necessary party to the second declaration of uses; and, therefore, Lord Tankerville claimed under him, and the eviction was within the covenant.

5. It may be proper to mention, that the case of Butler v. Swinnerton, which (to borrow an expression of Lord Kenyon's) is the magna charta of the liberal construction of covenants for title, is also stated in Shep. Touch. 171, which goes on to state, "and so it is also, if A. purchase land of B., to have and to hold to A. for life, the remainder to C. the son of A. in tail, and after A. doth make a lease of this land to D. for years, and doth covenant for the quiet enjoying, as in the last case, and then he dieth; and then C. doth oust the lessee; in this case this was held to be no breach of the covenant:" and for this position, Swan's case, M. 7 and 8 Eliz. is cited, and no reference is made to any other report of the case. Now this case, as it stands in Shep. Touch. (a book of acknowledged authority) is in direct opposition to the decision in Butler v. Swinnerton; but from other reports of Swan's case(e),

<sup>(</sup>c) Mo. 74, pl. 204; Dy. 257, pl. 13; Bendl. 138, pl. 208; and And 12, pl. 25.

it appears that there was no actual covenant in the lease, but merely a covenant in law on the words "concessit et dimisit," and therefore the Judges thought the action did not lie, because the covenant determined with the estate of the lessee.

- 6. A covenant for quiet enjoyment, quietly and clearly acquitted of and from all grants, &c. rents, rent-charges, &c. whatsoever, has been holden to extend to an annual quit-rent payable to the lord of the manor, and incident to the tenure of the lands sold, although there was no arrear of the rent due(f)(311).
- 7. A covenant for quiet enjoyment against any interruption (\*)of, from or by the vendor or his heirs, or any person whomsoever, legally or equitably claiming, or to claim any estate, &c. in the premises, by, from, under or in trust for him or them, or by, through or with his or their acts, means, default, privity, consent or procurement, was adjudged to extend to an arrear of quit-rent due at the time of the conveyance, although it was not shown that the rent accrued due during the time the vendor held the estate. For the Court said, if it were in arrear in his life-time, it was a consequence of law, that it was by his default; that is, by his default in respect of the party with whom he covenants to leave the estate unincumbered(g).

In this case it was argued by the counsel for the vendor, and apparently on very solid grounds, that to make the vendor liable to the arrear of this rent, under his covenant, would be tantamount to a decision that the covenant, although limited, should extend to the acts of all the world. The clear intention of the parties was,

<sup>(</sup>f) Hammond v. Hill, Com. 180.

<sup>(</sup>g) Howes v. Brushfield, 3 East, 491. See and consider Lord Alvanley's judgment in Hesse v. Stevenson, 3 Bos. & Pull. 565.

<sup>(311)</sup> See New-York Corporation v. Cashman, 10 Johns. Rep. 96.

that the vendor should covenant against his own acts only; and yet it should seem that the argument of the Court would apply as well to a mortgage, or any other incumbrance created by a prior owner, as to an arrear of quit-rent, in payment of which a former occupier made default.—The reader should be cautious how he applies this decision to cases arising in practice, as it may lead him to draw conclusions not authorized by prior decisions.

- 8. We should be careful to distinguish the foregoing case from that(h) where the lessor, reciting that he was seised of an estate of freehold and inheritance in the estate, (\*)covenanted for quiet enjoyment against himself, his heirs, &c. or any other person or persons lawfully claiming by, from or under him, &c. or by or through his, their or any of their acts, means, default or procurement. The lessees were evicted by the remainder-man under a settlement, and it appeared that the lessor could have obtained the fee-simple by suffering a recovery. Lord Rosslyn considered it to be clear, that on eviction by any person claiming paramount to the lessor, they must, upon that eviction, have under the covenant in the leases satisfaction from his assets. The ground of this opinion must have been, that the eviction was owing to the default of the lessor, in not suffering a recovery. He assumed to be tenant in fee, and the nature of his title rested in his own breast; whether the default arose from fraud or negligence was to the lessees immaterial.
- 9. In Woodhouse v. Jenkins(i), tenant for life and his eldest son remainder-man in tail, demised to A. for 99 years, he being aware of their title, and they covenanted with him for quiet enjoyment against themselves, their heirs

<sup>(</sup>h) Lady Cavan v. Pulteney, 2 Ves. jun. 544. See Reg. Lib. B. 1799, fo. 816.

<sup>(</sup>i) 9 Bing. 431; 2 Moo. & Scott, 599, S. C.

and assigns, and all persons claiming under them. A. granted an under-lease of the estate to B., and covenanted for quiet enjoyment against himself, his heirs, executors, administrators and assigns, "or of or by any other person or persons whomsoever lawfully claiming or to claim by, from or under him, them, or any of them, or by his, their, or any of their acts, means, consent, neglect, default, privity or procurement." The tenants for life and in tail both died, the latter without issue, and B. was evicted by the next remainder-man; it was held that A. was not liable on his covenant, for the eviction was by a title paramount, which he could not have defeated. The Court observed, that if the eviction could be brought (\*) within the terms of the covenant, it must fall within that part of it which provides against any persons claiming "by the acts, means, consent, neglect, default, privity or procurement of A., &c." It was not an eviction arising from the acts, means, or procurement of the lessor. After referring to the case of Butler and Swinnerton, the Court said, that in the present case, no act was done by the lessor, no consent was given to the eviction, there was no privity, no procurement; and consequently the only words of the covenant, if any, upon which a breach could be assigned, would be the remaining words, "neglect or default." Now it must be admitted that the eviction would have been prevented if A., at the time he took the leases for 99 years, had required the lessors to join in common recoveries to cut off the entails, and if the lessors had complied with such requisition. The question is, therefore, whether the not procuring such common recoveries to be suffered was a "neglect or default" in A., within the meaning of the covenant. And the Court were of opinion that no breach of covenant could be assigned on those words, unless it could be averred in the declaration that A., at the time the leases were made to him, had the power or means of procuring (\*90)

such common recoveries to be suffered by his lessors, the tenants for life and in tail, and that he neglected or omitted so to do. With such an allegation made and proved, an action of covenant might possibly be maintainable, but not without it. For if A. had no means of compelling common recoveries to be suffered by the lessors, if upon his requisition they refused, it could hardly be said that he was guilty of any neglect or default in not procuring that step to be taken which he was unable to compel. It might indeed show a want of discretion in A., that he took leases under such a defeasible title; but a neglect and a default seemed to (\*)imply something more than the mere want of discretion with respect to his own interests; something like the breach of a duty or legal obligation existing at the time; those words, in their proper sense, implying the not doing some act to secure his title which he ought to have done, and which he had the power to do, and the not preventing or avoiding some danger to the title, which he might have prevented or avoided.

II. We are now to consider in what cases restrictive words added to some of the covenants only, shall extend to all the covenants in the deed.

It may be first necessary to premise, that where covenants are limited to particular acts, as to the acts of the vendor for instance, the covenants are restrained in the following manner: "that for and notwithstanding any act, deed, matter or thing whatsoever, by him the said A., the vendor, made, done, committed or executed, or knowingly or willingly suffered to the contrary thereof," he is seised in fee. And that, "for and notwithstanding any such act, deed, matter or thing whatsoever, as aforesaid," he has power to convey. And that the purchaser, his heirs and assigns, shall quietly enjoy "without the interruption, &c. of A. or his heirs, or any person claim-

ing by, from or under, or in trust for him or them."

"And that"(1) free from incumbrances made or suffered
"by A., or any person claiming by, from or under, or in
trust for him." And lastly, that "A., and all persons
(\*)claiming any estate in the premises by, from or under,
or in trust for him," shall execute further assurances.
But although this is the usual and technical manner of restraining covenants, yet an agreement, in any part of a
deed, that the covenants shall be restrained to the acts of
particular persons, will be good, notwithstanding that the
covenants themselves are general and unlimited(j)(312).

2. General covenants will not, however, be cut down, unless the intention of the parties clearly appears (313).

Therefore, in the case of Cooke v. Foundes(k), where the vendor covenanted that he was seised of a good estate in fee, according to the indenture made to him by B. (of whom he purchased), it was determined to be a general covenant; for the reference to the conveyance by B. served only to denote the limitation and quality of the estate, and not the defeasibleness or indefeasibleness of the title.

In a modern case, where, in an assignment of a lease by executors, they had covenanted for quiet enjoyment

- (j) Brown v. Brown, 1 Lev. 57.
- (k) 1 Lev. 40; 1 Keb. 95.

<sup>(</sup>I) This pronoun is used emphatically. You shall enjoy the estate, and that free from incumbrances. Dr. Johnson has extracted a passage from the Duty of Man, in which the word is used in the same sense: "We must direct our prayers to right ends; and that either in respect of the prayer itself, or the things we pray for." It has, however, been thought that the word has crept into the common form of covenants through inadvertence.

<sup>(312)</sup> See Cole v. Hawes, 2 Johns. Cas. 203.

<sup>(313)</sup> See Whallon v. Kauffman, 19 Johns. Rep. 97. Jackson v. Stevens, 16 Johns. Rep. 110.

<sup>(\*92)</sup> 

without any let, &c. of them, or either of them, their or either of their executors, administrators or assigns, or any other person or persons whomsoever, it was insisted at the bar that executors can only be understood to covenant against their own acts; and therefore, that the words "any other person or persons whomsoever," must be restrained to persons claiming under them. And it is, perhaps, not too much to say, that the opinion of the Court inclined to this construction (l)(314). Wherever, therefore, executors or trustees agree to enter into covenants extending beyond their own acts, the agreement of the parties should be distinctly stated in the recitals.

3. In a case(m) where A and B were joint-tenants for (\*) years of a mill, A. assigned all his interest to C., without the assent of B., and died. B. afterwards, by indenture reciting the lease, and that it came to him by survivorship, granted the residue of the term to J. S., and covenanted for quiet enjoyment of it notwithstanding any act done by him. B. also gave the purchaser a bond conditional to perform the covenants, grants, articles and agreements in the assignment; and the purchaser having been evicted by C. of the moiety assigned to him, brought an action on the bond, and obtained judgment. Eldon(n) seemed to consider the judgment as having turned on the recital, and that the recital itself amounted to a warranty. But the ground of the decision appears to be, that the word grant in the assignment amounted to a warranty of the title, and was not qualified by the ensuing particular covenant, because the grant was of the whole estate, as appeared from the recital, and was de-

<sup>(1)</sup> Noble v. King, 1 H. Black. 34.

<sup>(</sup>m) Proctor v. Johnson, Yelv. 175; Cro. Eliz. 809; Cro. Jac. 233.

<sup>(</sup>n) See 2 Bos. & Pull. 25; and see Seddon v. Senate, 13 East, 63; Barton v. Fitzgerald, 15 East, 530.

<sup>(314)</sup> See Thayer v. Wendell, 1 Gallis. 37.

fective from the first as to a moiety, and the condition of the bond was to perform all grants, &c.(315).

It seems material to refer the case of Johnson v. Proctor to the true ground of the decision, because if the case turned solely on the recital, it might perhaps be thought that a general recital in a conveyance of the inheritance of an estate, that the vendor is seised in fee, would amount to a general warranty, and would not be controlled by limited covenants for the title—a proposition which certainly cannot be supported.

4. Where restrictive words are inserted in the first of several covenants having the same object, they will be construed as extending to all the covenants, although they are distinct.

Thus, in Nervin v. Munns(o), the vendor covenanted, (\*)1st, that notwithstanding any act by him to the contrary, he was seised in fee: 2dly, that he had good right to convey: 3dly, that the lands were clear of all incumbrances made by him, his father, or grandfather: and 4thly, that the vendee should quietly enjoy the estate against all persons claiming under the vendor, his father, or grandfather. And it was holden by three Justices against North, Chief Justice, that the second covenant, although general, was restrained by the first covenant to acts done by the vendor.

So in Browning v. Wright(p), where a vendor who claimed an estate in fee by purchase, sold the estate, and

<sup>(</sup>o) 3 Lev. 46.

<sup>(</sup>p) 2 Bos. & Pull. 13.

<sup>(315)</sup> See Kent v. Welch, 7 Johns. Rep. 258. See also, Vanderkarr v. Vanderkarr, 11 Johns. Rep. 122. Where there is an express covenant, more limited than the covenant which the law would imply, it will have the effect of restraining the implied covenant. Blair v. Hardin, 1 Marsh. 232. And a particular recital in a deed, cannot be restrained by general words. See Jackson v. Stevens, 16 Johns. Rep. 110.

<sup>(\*94)</sup> 

covenanted first, that notwithstanding any thing by him done to the contrary, he was seised in fee, "and that he had good right, &c. to convey in manner aforesaid," it was holden that the generality of the latter covenant was restrained by the restrictive words in the former. For, in the first place, the purchaser was, according to the general practice, entitled to limited covenants only; and, in the next place, the special covenants would be of no use, if the other were general. Besides, the defendant having covenanted that, "for and notwithstanding any thing by him done to the contrary," he was seised in fee, and that he had good right to convey; the latter part of the covenant, coupled as it was with the former part by the words "and that," must necessarily be over-ridden by the introductory words "for and notwithstanding any thing by him done to the contrary(q)."

Again, where tenant per auter vie leased for twentyone years, and covenanted that he had not done any act,
but the lessee should or might enjoy it during the years;
afterwards, within the twenty-one years, cestui que vie
(\*)died; and it was adjudged that the covenant was not
broken, for "but" referred the subsequent words to the
preceding words(r).

So in Broughton v. Conway(s), a covenant that the vendor had not done any act to disturb the vendee, but that the assignee might enjoy without the disturbance of him or any other person, was held to be confined to acts done by the vendor, on the ground of the latter words being only a continuation of and dependent on the preceding matter. In this case, however, one of the Judges was decidedly of a contrary opinion; and certainly there

<sup>(</sup>q) Per Lord Alvanley, 3 Bos. & Pull. 574.

<sup>(</sup>r) Peles v. Jervies, Dy. 240, marg.; Cro. Jac. 615, pl. 5.

<sup>(</sup>s) Dy. 240; Mo. 58; and see S. C. cited and applied by Lord Ellenborough, C. J. 8 East, 89; and 1 Brod. & Bing. 340; 3 Moo. 730.

were express words to get over, namely, "or any other person;" which circumstance does not occur in any other of this line of cases, in all of which the reader will perceive, that no word was rendered inoperative, but the introductory clause was merely held to extend over all the distinct covenants, in the same manner as a general introduction to a will frequently influences the whole will. And in a recent case(t), where the covenants were introduced with the usual words, restricting them to the covenantor's own acts, but the covenants for quiet enjoy-ment ended thus: "of or by the said grantors or any of them, &c. or of or by any other person or persons whatsoever:" and the covenant against incumbrances was general, excepting only a chief-rent; the Court of King's Bench determined, that the covenant for quiet enjoyment was not restrained by the introductory words of restriction, but was general and unlimited. Lord Ellenborough, C. J. in delivering the opinion of the Court, justly laid great stress on the covenant being a distinct covenant (\*)from the covenant for title. He said, that it was perfectly consistent with reason and good sense, that a cautious grantor should stipulate in a more restrained and limited manner, for the particular description of title which he purports to convey, than for quiet enjoyment. He may suspect, or even know, that his title is, in strictness of law, in some degree imperfect, but he may at the same time know, that it has not become so by any act of his own; and he may likewise know, that the imperfection is not of such a nature as to afford any reasonable chance of disturbance whatever to those who should take under it; he may, therefore, very readily take upon him an indemnity against an event which he considers as next to impossible, while he chooses to avoid a responsibility for the strict legal perfection of his title to the estate, in case

<sup>(</sup>t) Howell v. Richards, 11 East, 633. (\*96)

it should be found at any period to have been liable to some exception at the time of his conveyance.

In a later case(u), where the subject was elaborately discussed, the covenants in an assignment of a leasehold estate were, 1. that notwithstanding any act by the seller, the lease was a good lease; 2. "and further, that" the purchaser might peaceably enjoy without any interruption from "the seller, his executors, administrators or assigns, or any other person or persons whatsoever having or lawfully claiming, or who should or might at any time or times thereafter, during the said term, have or lawfully claim any estate," &c. in the premises; and that free from incumbrances by the seller; and moreover, for further assurance by the seller, his executors and administrators, and all persons claiming by, from, under or in trust for him or them. All the covenants therefore were restricted to the acts of the seller, except the covenant for quiet enjoyment, which in words expressly extended to all mankind. (\*)It was held by three Judges against one, that by construction the covenant for quiet enjoyment was restrained to persons claiming under the seller, and this case was distinguished from Howell v. Richards, on the ground that there the covenant, respecting incumbrances, contained words as general as the words of the preceding covenant for quiet enjoyment, with one single exception, viz. the chief-rent, which was not an act or default of the party, or of any claiming under him: this exception, therefore, confirmed the generality of all the other words.

Perhaps we should in this place notice the case of Barton v. Fitzgerald(v). It arose upon covenants in an assignment of a lease. The lease was recited to be for the term of ten years, and the seller assigned the estate to

<sup>(</sup>u) Nind v. Marshall, 1 Brod. & Bing. 319; 3 Moo. 703; and see Foord v. Wilson, 8 Taunt. 543; 2 Moo. 592.

<sup>(</sup>v) 15 East, 530; see 3 Barn. & Adolph. 195.

the purchaser for the residue of that term. The covenants were, first, the common covenant, that the seller had done no act to incumber, except an under-lease; 2dly, "and also," that the lease was subsisting, and not become void or voidable; 3dly, for quiet enjoyment against the act of the seller; and lastly, for further assurance of the seller during the residue of the term. It appeared that the lease was for ten years, if a person should so long live, and he died after the assignment, but before the expiration of the ten years, by effluxion of time. And the Court of King's Bench held, that the second covenant was general and unlimited, and that by the death of the cestui que vie, the purchaser had a good right of action. The Judges relied principally on the recital. The exception of the under-lease, which was for a term absolute, imported, they thought, that the seller had a right to incumber absolutely for the term stated, and they were of opinion, that all the other covenants would be operative, though the second were construed to be absolute. This (\*)case, it will be observed, depended upon very particular circumstances; independently of which it should seem, that the covenant upon which the purchaser recovered would have been restrained by the other covenants.

5. But where the *first* covenant is general, a subsequent limited covenant will not restrain the generality of the preceding covenant, unless an express intention to do so appear, or the covenants be inconsistent (316).

Thus in Gainsford v. Griffith(x), on an assignment of a leasehold estate, the vendor covenanted that the lease was a good, certain, perfect and indefeasible lease in the law, and so should remain during the residue of the term,

<sup>(</sup>x) 1 Saund. 58; 1 Sid. 328. See 2 Bos. & Pull, 23, 25; 1 Brod. & Bing. 331; 3 Moo. 723.

<sup>(316)</sup> See Cole v. Hawes, 2 Johns. Cas. 203.

<sup>(\*98)</sup> 

and that the purchaser, his executors, administrators and assigns, should quietly enjoy the premises without any let, denial, &c. by the vendor, his executors or assigns; and acquitted or otherwise saved harmless of all incumbrances committed by the vendor. And it was holden, that the generality of the preceding covenant was not restrained by the latter covenant.

And in Norman v. Foster, Lord C. J. Hale said,—If I covenant that I have a lawful right to grant, and that you shall enjoy, notwithstanding any claiming under me; these are two several covenants, and the first is general, and not qualified by the second. And to this Wylde, J. agreed, and he said, that one covenant went to the title, and the other to the possession(y).

So in the late case of Hesse v. Stevenson(z), where, on an assignment of certain shares of a patent right, the assignor covenanted, that he had good right, &c. to convey the shares, and that he had not by any means directly or indirectly forfeited any right or authority he ever had or might have had over the same, it was decided that the . (\*)generality of the first covenant was not restrained by the latter covenant. Lord Alvanley said, that the covenant, instead of being framed in the usual and almost daily words, where parties intend to be bound by their own acts only, viz. "for and notwithstanding any act by him done to the contrary," omitted them altogether. The omission of these words was almost of itself decisive. The attention of the purchaser was not called by any words to the intent of the vendor to confine his covenant to his own acts. The Court ought not to indulge parties in leaving out words which are ordinarily introduced, and by which the real meaning of the parties might be plainly understood.

<sup>(</sup>y) 1 Mod. 101.

<sup>(</sup>z) 3 Bos. & Pull. 565.

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6. In Milner v. Horton(a), where the covenants in a conveyance were, 1. for a good title; 2. right to convey; 3. for quiet enjoyment, restricted to the sellers and persons claiming under them; 4. and that free from incumbrances by the sellers and persons claiming under them; the Court of Exchequer held, that it was the evident intention of the sellers to bind themselves by the two first covenants, that the vendees should have a good estate in fee simple, so far as rested in them, and therefore considered them qualified by the subsequent covenants. But in Smith v. Compton(b), that case was over-ruled. In the last case the deed was a common conveyance under a power, the creation of which was recited in the usual way. The covenants by the seller were, 1. that the power was in full force; 2. and that he had good right to appoint and convey; 3. and further for quiet enjoyment against the seller or any person or persons claiming or to claim by, from or under or in trust for him; 4. and that free from incumbrances made by the . seller, or any other person or persons claiming or to claim (\*)by, from, through, under or in trust for him; and 5. for further assurance by the seller, and all persons claiming or to claim by, from or under or in trust for him; and it was determined that the second covenant for right to convey was absolute and not qualified by the subsequent covenants. The Court said, that looking at all the cases which were cited for the defendants, there was only one, Milner v. Horton, where a general covenant had been held to be qualified in the manner here contended for, unless there appeared something to connect it with a restrictive covenant, or unless there were words in the covenant itself amounting to a qualification. It was said, that an absolute covenant for title was inconsistent with

<sup>(</sup>a) M'Clel. 647.

<sup>(</sup>b) 3 Barn. & Adolph. 189...

<sup>(\*100)</sup> 

a qualified one for quiet enjoyment: the Court was not sure that that was so generally; but that at any rate was an instrument of a particular nature. It began by a statement of the specific power vested in the seller, for the disposal of the premises, which was followed by a covenant that the power had not been executed, and by other special covenants, which, in a deed so stating the vendor's title, might, not inconsistently, be introduced at the same time that the vendor covenants generally for right and power to convey. With one exception, there was no case where a general covenant had been held to be qualified by others, unless in some way connected with them. The Court had considered Milner v. Horton again since the argument, and they could not feel themselves bound by its authority: they came therefore to this conclusion, that the covenant declared upon, being unqualified in itself, and unconnected with any words in the qualified covenants, must, in a court of law, be regarded as an absolute covenant for title.

7. And in cases of this nature, as, on the one hand, a subsequent limited covenant does not restrain a preceding general covenant, so, on the other hand, a preceding (\*)general covenant will not enlarge a subsequent limited covenant.

Thus, in Trenchard v. Hoskins(c), a person being seised of an estate granted under letters patent, conveyed it to a purchaser, and in the conveyance the grant from the Crown was recited, and the title was deduced from the grantee to the vendor, who entered into covenants, first, that he was seised in fee; secondly, that he had good power to convey; and thirdly, that there was no reversion in the Crown, notwithstanding any act done by him. In grants of lands by the Crown, it is usual to reserve a reversion which the grantee cannot bar. After

<sup>(</sup>c) Winch, 91; 1 Sid. 328. See 2 Bos. & Pull. 19. vol. 11. (\*101)

great difference of opinion on the subject, it seems to have been decided, that the restrictive words to the last covenant did not extend to the two preceding ones; the Court presuming the intention to be, that the vendor should enter into an absolute covenant for his seisin in fee, in all cases but one; namely, that he should not be liable on the objection of a reversion existing in the Crown, unless that reversion appeared to have been vested in the Crown by his own act(d).

8. Where the covenants are of divers natures, and concern different things, restrictive words added to one shall not control the generality of the others, although they all relate to the same land(e).

Thus, where A. covenanted that he was seised in fee notwithstanding any act done by him, and that the lands were of a certain annual value; the latter was holden to be an absolute covenant, that the lands were of the stated value (f).

- (\*)So in another case(g), where a man covenanted that he was seised in fee, notwithstanding any act done by him or any of his ancestors; and that no reversion was in the king or any other; and that the estate was of a certain annual value; and that the plaintiff and his heirs should enjoy the estate discharged from all incumbrances made by him or any of his ancestors, it was decided, that the covenant as to value was an absolute and distinct covenant, and had no dependence upon the first part of the covenant.
- 9. In the case of Rich v. Rich(h), a covenant "that lands were of the value of 1000l. per annum, and so should continue, notwithstanding any act done or to be

<sup>(</sup>d) See 2 Bos. & Pull. 25, per Lord Eldon.

<sup>(</sup>e) See 3 Lev. 47.

<sup>(</sup>f) Hughes v. Bennett, Cro. Car. 495; 1 Jones, 403, S. C.

<sup>(</sup>g) Crayford v. Crayford, Cro. Car. 106.

<sup>(</sup>h) Cro. Fliz. 43.

<sup>(\*102)</sup> 

done by the covenantor," was holden to be only a covenant that the covenantor had not lessened the value.

10. This subject must not be closed without observing, that if general covenants are entered into contrary to the intention of the parties, equity will, on sufficient proof, correct the mistake in the same manner as errors are corrected in marriage articles, and will relieve against any proceedings at law upon the covenants, as they originally stood(i).

III. 1. It still remains to say a few words concerning a purchaser's remedy under covenants for the title; and first, if he be evicted, and the eviction is within the covenant, he may bring an action at law for damages.

2. But, as we have already seen, unless the eviction be within the covenant, or there was a fraudulent concealment of the defect, a purchaser cannot recover the (\*)purchase-money, in case of eviction, either at law or in equity (k).

3. If the title prove bad, a purchaser may have recourse to law for damages, or if the defect can be supplied by the vendor, he may file a bill in equity for a specific performance of the covenant for further assurance. And a vendor who has sold a bad title, will, under a covenant for further assurance, be compellable to convey any title which he may have acquired since the conveyance, although he actually purchased such title for a valuable consideration(l). But after a conveyance executed, a bill cannot be filed for compensation(317).

<sup>(</sup>i) Coldcott v. Hill, 1 Cha. Ca. 15; 1 Sid. 328, cited; Fielder v. Studly, Rep. temp. Finch, 90. See 2 Bos. & Pull. 26; 3 Bos. & Pull. 575; and supra, Vol. 1, p. 161.

<sup>(</sup>k) Supra, Vol. 1, p. 554.

<sup>(</sup>l) Taylor v. Debar, 1 Cha. Ca. 274; 2 Cha. Ca. 212. See Seabourne v. Powell, 2 Vern. 11; and see ch. 16, s. 10, infra.

<sup>(317)</sup> See M'Williams v. Nisley, 2 Serg. & Rawle, 515.

4. It seems that, under a covenant for further assurance, a purchaser may require a duplicate of the conveyance to be executed to him, in case he is compelled to part with the original to a purchaser from him of part of the estate(m); but it may be doubted whether he can require a covenant to produce the title-deeds if the purchase was completed without such a covenant(n).

5. So if the vendor become bankrupt, the purchaser may call upon his assignees to execute further assurances, although the vendor was only tenant in tail, and did not

suffer a recovery(o)(I).

6. But if the original contract was not fit to be executed by equity, the Court will not interfere in behalf of the purchaser, leave him to but his remedy at law(p)(318). And if the title prove bad, and the purchase was made at (\*)a great undervalue, equity will relieve the vendor against an action on the covenants for title, allowing the purchaser his purchase-money, with interest only, he discounting the mesne profits(q).

7. An action for breach of a covenant for title(r) will not be barred by the bankruptcy and certificate of the covenantor, although the cause of action accrued before

the bankruptcy.

- 8. An action of covenant did not lie against a devisee upon the statute of fraudulent devises(s). No such re-
  - (m) Napper v. Lord Allington, 1 Eq. Ca. Abr. 166, pl. 4.
  - (n) Fain v. Ayers, 2 Sim. & Stu. 533. See Hallett v. Middleton, 1 Russ. 243.
    - (o) Pye v. Daubuz, 3 Bro. C. C. 595.
    - (p) Johnson v. Nott, 1 Vern. 271.
    - (q) Zouch v. Swaine, 1 Vern. 320.
  - (r) Hammond v. Toulmin, 7 Term Tep. 612; Mills v. Auriol, 1 Hen. Blackst. 433.
    - (s) 3 W. & M. c. 124; Wilson v. Knubley, 7 East, 128.

<sup>(</sup>I) See now 3 & 4 Will. 4, c. 74, s. 55 to 69.

<sup>(318)</sup> See Sims's Admr v. Lewis's Exr. 5 Munf. 31. (\*104)

medy lies at common law, and therefore, although a vendor died seised of real estates, yet if they were devised by his will, a purchaser would not have any remedy against them, notwithstanding that the covenants for title were broken, and there was no other fund to which he can resort for damages. This is now remedied by the 1 W. 4, c. 47, which(t) expressly extends the provisions of the former statute to the case of covenants.

Lastly, the purchaser is not bound to give notice of an adverse suit to the covenantor; but if he compromise it, may recover the whole sum paid and his costs between solicitor and client, if the claim was within the covenant. The only effect of want of notice in such a case as this is, to let in the party who is called upon for an indemnity, to show that the plaintiff has no claim in respect of the alleged loss, or not to the amount alleged, that he had made an improvident bargain, and that the defendant might have obtained better terms if the opportunity had been given to him. But that must be proved(u).

<sup>(</sup>t) s. 3; see 3 & 4 W. 4, c. 104.

<sup>(</sup>u) Smith v. Compton, 3 Barn. & Ald. 407.

## (\*)CHAPTER XIV.

OF THE PERSONS INCAPABLE OF PURCHASING.

UNDER this head we may consider, 1st, Who are incapable of purchasing absolutely for their own benefit by the general rules of law: and, 2dly, Who are incapable of purchasing particular property, except under particular restraints, on account of the rules of equity.

## SECTION I.

20000

Of Persons incapable of Purchasing by the general Rules of Law.

This incapacity is of three kinds: 1st, An absolute incapacity: 2dly, An incapacity to hold, although an ability to purchase: and, 3dly, An incapacity to purchase, except sub modo.

I. First then, With respect to persons who are altoge-

ther incapable of purchasing.

The parishioners, or inhabitants of any place, or the churchwardens, are incapable of purchasing lands(a) by those names.

But it seems that in London the parson and church-

<sup>(</sup>a) Co. Litt. 3 a. (\*105)

wardens are a corporation to purchase lands(b). And churchwardens and overseers are enabled, by statute (\*)law(c), to purchase a workhouse for the poor, but this is merely as trustees, and does not affect the general rule of law.

II. With respect to persons who are capable of purchasing, but incapable of holding: They are,

1st, Aliens: for although they may purchase, yet it can only be for the benefit of the king: and upon an office found, the king shall have it by his prerogative (d)(319). And it seems that an alien cannot protect himself by taking the conveyance in the name of a trustee, for the mischief is the same as if he had purchased the lands himself (e)(320).

But if an alien be made a denizen by the king's letters patent, he is then capable of holding lands(f) purchased after his denization.

<sup>(</sup>b) Warner's case, Cro. Jac. 532; Hargrave's n. (4) to Co. Litt. 3 a.

<sup>(</sup>c) 9 Geo. 1, c. 7, s. 4, -

<sup>(</sup>d) Co. Litt. 2 b.

<sup>(</sup>e) The King v. Holland. All. 14; Sty. 20, 40, 75, 84, 90, 94; 1 Ro. Abr. 194, pl. 8.

<sup>(</sup>f) Co. Litt. 2 b.

<sup>(319)</sup> See Orr v. Hodgson, 4 Wheat. 460. Jackson v. Lunn, 3 Johns. Cas. 109, 113. Storer v. Batson, 8 Mass. Rep. 445. Clifton v. Haig's Exrs. 4 Des. 335. Jackson v. Beach, 1 Johns. Cas. 399. Fairfax's Dev. v. Hunter's Les. 7 Cranch, 603. Craig v. Leslie, 3 Wheat. 563, 589. Craig v. Radford, 3 Wheat. 594. Sheaffe v. O'Neal, 1 Mass. Rep. 256. Fox v. Southack, 12 Mass. Rep. 143. M'Creery's Les. v. Wilson, 4 Har. & M'Hen. 412. Doe v. Horniblea, 2 Hayw. 37. Hunt v. Warnicke, Hardin, 61. Where a person dies, leaving issue, who are aliens, they shall not be deemed his heirs at law; but the estate will descend to the next of kin. Orr v. Hodgson, 4 Wheat. 461. See further, as to this point, Jackson v. Jackson, 7 Johns. Rep. 214.

<sup>(320)</sup> See Craig v. Leslie, 3 Wheat. 576. et seq.

And it seems, that if an alien purchase lands, and before office found the king make him a denizen by letters patent, and confirm his estate, the confirmation will be good; as the land is not in the king till office found (g)(321).

2dly, Persons who have committed felony or treason, or have been guilty of the offence of præmunire, and afterwards purchase lands, and then are attainted; for they have ability to purchase, although not to hold; and for that reason the lord of the fee shall have the lands; but if they purchase after they are attainted, they are then in the same situation with aliens, and the lands must go to the king(h).

Lastly, Corporations sole or aggregate, either ecclesiastical or temporal, cannot hold lands without due license (\*)for that purpose(k)(322): and the lord of the fee, or in default thereof within the time limited by the statutes, the king may enter(l).

III. With respect to persons capable of purchasing sub modo: They are,

1st, Infants under the age of twenty-one years, who may purchase, and at their full age may bind themselves by agreeing to the purchase; or may wave the purchase without alleging any cause for so doing: and if they do

(g) Goulds. 29, pl. 4.

<sup>(</sup>h) Co. Litt. 2 b. See Rex v. Inhab. of Haddenham, 15 East, 463.

<sup>(</sup>k) Co. Litt. 99 a.

<sup>(1)</sup> Co. Litt. 2 b.

<sup>(321)</sup> See Jackson v. Beach, 1 Johns. Cas. 399. See also, Meeks v. Richbourg, 1 Rep. Con. Ct. 411. Trustees of Louisville v. Gray, 1 Litt. 146. Elmendorf v. Carmichael, 3 Litt. 475. Jackson v. Lunn, 3 Johns. Cas. 120.

<sup>(322)</sup> See Jackson v. Hartwell, 8 Johns. Rep. 330. 2d edit. Jackson v. Hammond, 2 Caines' Cas. in Error, 337. Parish in Brunswick v. Dunning, 7 Mass. Rep. 445.

<sup>(\*107)</sup> 

not agree to the purchase after their full age, their heirs may wave the purchase in the same manner as the infants themselves could have done(m)(323).

2dly, Femes covert, who are capable of purchasing, but their husbands may disagree thereunto, and divest the whole estate, and maintain trover for the purchase-money(n)(324). If a husband neither agree nor disagree, the purchase by his wife will be effectual; but after his death she may wave the purchase, without giving any reason for so doing, although her husband may have agreed to it. And if, after her husband's death, she do not agree to it, her heirs may wave it(o).

A feme covert may, however, purchase lands pursuant to an authority given by her husband, and he cannot avoid it afterwards (p).

3dly, Lunatics or idiots, who are capable of purchasing; but although they recover their senses, cannot themselves, it should seem, wave the purchase (q)(325); and (\*) if they recover and agree thereunto, their heirs cannot set it aside.

If they die during their lunacy or idiocy, then their

- (m) Ketsey's case, Cro. Jac. 320; 1 Ro. Abr. 731, (K.); Co. Litt.
  2 b. See Holmes v. Blogg, 8 Taunt. 508; 2 Moo. 552.
- (n) Garbrand v. Allen, 1 Lord Raym. 224. See Francis v. Wigzell, 1 Madd 258.
  - (o) Co. Litt. 3 a; Barnfather v. Jordan, Dougl. 452, 2d edit.
  - (p) Garbrand v. Allen, ubi sup.
  - (q) On this point see 2 Blackst. Comm. 291, 7th edit.

<sup>(323)</sup> See Jackson v. Todd, 6 Johns. Rep. 257. Jackson v. Carpenter, 11 Johns. Rep. 539. Jackson v. Burchin, 14 Johns. Rep. 124. Rogers v. Hurd, 4 Day, 57.

<sup>(324)</sup> See Baxter v. Smith, 6 Binn. 427.

<sup>(325)</sup> See Webster v. Woodford, 3 Day, 100, 101. The English doctrine that a person non compos mentis, shall not be admitted to stultify himself, seems not to be acknowledged in this country. Id. See Millison v. Nicholson, Cam. & Nor. 499.

heirs may avoid the purchase (r)(326). And as the king has the custody of idiots, upon an office found he may annul the purchase (s): and after the lunatic is found so by inquisition, his committee may vacate the purchase (t).

Lastly, under this head we might formerly have ranked papists and persons professing the popish religion (u), who had neglected to take the oath prescribed by the 31 Geo. 3, c. 32(x). For a papist took for the benefit of his protestant next of kin till his conformity; for the benefit of himself after his conformity; and for the benefit of himself, during his life and non-conformity, by reason of the action which was given him; and might therefore be said to be capable of purchasing sub modo(y).

But by the 10 Geo. 4, c. 7, s. 23, it was enacted, that after the passing of that Act no oath or oaths should be tendered to or required to be taken by his Majesty's subjects professing the Roman-catholic religion, for enabling them to hold or enjoy any real or personal property, other than such as might by law be tendered to and required to be taken by his Majesty's other subjects.

- (r) Co. Litt. 2 b.
- (s) Co. Litt. 247 a.
- (t) Clerk by Committee v. Clerk, 2 Vern. 412; Addison by Committee v. Dawson, 2 Vern. 678; Ridler v. Ridler, 1 Eq. Ca. Abr. 279.
  - (u) See 11 & 12 W. 3, c. 4; Michaux v. Grove, 2 Atk. 210.
  - (x) See 43 Geo. 3, c. 30.
  - (y) See Mallom v. Bringloe, Willes, 75; Com. 570, S. C.

<sup>(326)</sup> See Webster v. Woodford, 3 Day, 101.

## (\*)SECTION II.

## Of purchases by Trustees, Agents, &c.

We come now to persons who are incapable of purchasing particular property, except under particular restraints, on account of the rules of equity.

- I. It may be laid down as a general proposition, that trustees (z)(327) (unless they are nominally such, as trustees to preserve contingent remainders (a), agents (b)(328), commissioners of bankrupts (c), assignees of bankrupts (c), as a superscript (c), and (c), and (c), as a superscript (c), and (c), and
- (z) Fox v. Mackreth, 2 Bro. C. C. 400; 4 Bro. P. C. by Tomlins, 258; Hall v. Noyes, 3 Bro. C. C. 483; and see 3 Ves. jun. 748; Kellick v. Flexny, 4 Bro. C. C. 161; Whitcote v. Lawrence, 3 Ves. jun. 740; Campbell v. Walker, 5 Ves. jun. 678; and Whitackre v. Whitackre, Sel. Cha. Ca. 13.
  - (a) See Parks v. White, 11 Ves. jun. 226.
- (b) York-Buildings Company v. Mackenzie, 8 Bro. P. C. 42; Low-ther v. Lowther, 13 Ves. jun. 95. See Watt v. Grove, 2 Scho. & Lef. 492; Whitcomb v. Minchin, 5 Madd. 91; Woodhouse v. Meredith, 1 Jac. & Walk. 204.
- (c) Ex parte Bennet, 10 Ves. jun. 381; ex parte Dumbell, Aug. 13, 1806; Mont. notes, 33, cited; ex parte Harrison, 1 Buck, 17.

(328) See Parkist v. Alexander; Green v. Winter, ut supra. Butler v. Haskell, 4 Des. 651. Howell v. Baker, 4 Johns. Ch. Rep. 118.

<sup>(327)</sup> See Green v. Winter, 1 Johns. Ch. Rep. 26. Parkist v. Alexander, 1 Johns. Ch. Rep. 394. Munro v. Allaire, 2 Caines' Cas. in Error, 183. Holridge v. Gillespie, 2 Johns. Ch. Rep. 30. Davoue v. Fanning, 2 Johns. Ch. Rep. 252. Howell v. Baker, 4 Johns. Ch. Rep. 118. Matthews v. Dragaud, 3 Des. 25. Les. of Lazarus v. Bryson, 3 Binn. 54, 59. Jackson v. Van Dalfsen, 5 Johns. Rep. 47.; and note a. p. 48. MGuire v. M'Gowen, 4 Des. 486. Perry v. Dixon, 4 Des. 504. in note. Moody's Les. v. Vandyke, 4 Binn. 43.

rupts(d)(I), (\*)solicitors to the commission(e), auctioneers, creditors who have been consulted as to the mode of sale(f), or any persons who, by their connection with any other person, or by being employed or concerned in his affairs, have acquired a knowledge of his property,) are incapable of purchasing such property themselves; except under the restrictions which will shortly be mentioned. For if persons having a confidential character were per-

- (d) Ex parte Reynolds, 5 Ves. jun. 707; ex parte Lacey, 6 Ves. jun. 625; ex parte Bage, 4 Madd. 459; ex parte Badcock, 1 Mont. & Mac. 231.
- (e) Owen v. Foulkes, 6 Ves. jun. 630, n. (b); ex parte Linwood; ex parte Churchill, 8 Ves. jun. 343, cited; ex parte Bennet, 10 Ves. jun. 381; ex parte Dumbell, Aug. 13, 1806; Mont. notes, 33, cited-See 12 Ves. jun. 372; 3 Mer. 200.
- (f) See ex parte Hughes, 6 Ves. jun. 617; Coles v. Trecothick, 9 Ves. jun. 234; 1 Smith's Rep. 233; Oliver v. Court, 8 Price, 127.
- (I) Lord Eldon has said, that the rule is to be more peculiarly applied with unrelenting jealousy in the case of an assignee of a bankrupt; adding, that it must be understood, that, whenever assignees purchase, they must expect an inquiry into the circumstances. See 6 Ves. jun. 630, n. (b); and 8 Ves. jun. 346; 10 Ves. jun. 395. And an assignee purchasing the estate himself, or permitting his co-assignee to purchase it, will be a sufficient cause of removal. Ex parte Reynolds, 5 Ves. jun. 707.

If an assignee purchase an estate sold under the commission, and upon an accidental increase in the value of the property, he afterwards sells it at a considerable advance, he cannot, upon discovering that he ought not to have been a purchaser, pay the difference of the sales to the general fund of the creditors. Ex parte Morgan, Feb. 24, 1806; Mont. notes, 31. And where upon the sale of a bankrupt's estate by auction, in two lots, both of the lots were bought in by the assignee without the consent of the creditors, the Lord Chanceller, although there was a profit on the resale of one lot, which was more than equal to the loss on the resale of the other, so that the balance was in favor of the estate, held the assignee liable to make good the loss on the lot which was resold at a less sum, without permitting him to set off the profit gained by the resale of the other lot. Ex parte Lewis, 1 Glyn. & Jame. 69. Ex parte Buxton, ib. 355.

mitted to avail themselves of any knowledge acquired in that capacity, they might be induced to conceal their information, and not to exercise it for the benefit of the persons relying on their integrity. The characters are inconsistent. Emptor emit quam minimo potest, venditor vendit quam maximo potest(1)(329).

The sale to a trustee or agent is not absolutely void; but may always be avoided by the cestui que trust, or by the principal, unless long acquiescence, with knowledge of their rights, warrants a presumption that they approved and ratified the sale. And this extends to the case of a guardian under the act for the partition of lands; for he who undertakes to act for another, shall not, in the same matter act for himself. The case of Jackson v. Woolsey, 11 Johns. 446, does not impugn this principle; for in that case it was not the wards who were endeavoring to set aside the sale to their guardian; and no one but the wards, or a cestui que trust can impeach the sale, unless fraudulent. A trustee or guardian, however, may purchase under a special decree of the court of Chancery; and in this way he may acquire a good title. So, the ward may confirm the sale by delay. These principles were recognized in Gallatian v. Cunningham, 8 Cowen, 361, (in error) where it was decided that a purchaser resting his claim in equity on the fact of being a bona fide purchaser, was bound to deny all knowledge of the facts charged; otherwise evidence will not be admitted to show their ignorance of the fraud: it is for the person thus claiming, to maintain that he was such purchaser without notice :- and if he, or those claiming under him, do not do so, witnesses shall not do it for them. If a purchaser, says Chancellor Kent, in the case of Denning v. Smith, 3 J. Ch. R. 345, " wishes to rest his claim on the fact, he must deny notice, although it be not charged in the bill. He must deny every circumstance from which notice could be inferred." And in the the language of senator Colden in the case cited from Cowen, "He must do this, be-

<sup>(</sup>I) This principle has been attended to in the general inclosure act, which renders commissioners incapable of purchasing any estate in the parish in which the lands are intended to be inclosed, either in the names of themselves or others, until five years after the date and execution of the award, 41 Geo. 3, c. 109, s. 2.

<sup>(329)</sup> See Davoue v. Fanning, 2 Johns. Ch. Rep. 257 to 271, where the English decisions are reviewed. Green v. Winter, 1 Johns. Ch. Rep. 36. Evertson v. Tappen, 5 Johns. Ch. Rep. 497. Hawley v. Mancius, 7 Johns. Ch. Rep. 174.

The able counsel for the appellants in York-Buildings Company v. Mackenzie(g), strongly observed, that the ground on which the disability or disqualification rests, is (\*)no other than that principle which dictates, that a per-

(g) 8 Bro. P. C. 63, where the authorities in the civil law are collected.

cause want of notice is an essential part of the purchaser's title; and unless he, or those claiming under him, aver that he had not notice, the title is defective. I wish to establish as a principle, and mean to do it, so far as my opinion can establish any thing, that if a guardian purchases the estate of his ward, without the special permission of a court, the sale may be set aside while the property is in the hands of the guardian, on the application of the ward, within a reasonable time; and if the guardian makes a conveyance to another person, the property may be claimed in the hands of such person, unless the holder places himself in such a situation, as that a court of equity my consider him a bona fide purchaser without notice."

The law has wisely forbidden executors and trustees from acting in the double capacity of sellers and purchasers; especially in a case where the executor had authority by will to sell: and he sold at private sale for the purpose of enabling a third person to reconvey the estate to the executor. The transaction is a legal fraud; and the purchaser is chargeable with notice of the fraud. The title may be impugned in the hands of such a purchaser. Such a deed is not absolutely void; and therefore, no party to the deed, or others claiming under them, may be allowed to repudiate it; neither can strangers avail themselves of such an objection. It is voidable by the cestui que trust or his heirs. Den v. Wright, 2 Hals. R. 175. And a purchaser with notice is in no better situation than the person from whom he derives his title, and is bound by the same equity; Hughes v. Edwards, 9 Wheat, 499.

The principle of courts of equity might be applied to the case of an executor or administrator purchasing, to make the purchaser hold as trustee for the heirs, and to compel him to sell the land and to pay the excess obtained above what he gave for it; but that proceeds on the ground that the conveyance to the trustee was not void, but voidable by the persons interested in the estate. If they are satisfied with the conveyance, the validity of it cannot be impeached by a stranger. Harrington v. Brown, 5 Pick. 519: Den v. M'Knight, 6 Hals. 585: Fay v. Hunt, 5 Pick. 398.

(\*111)

son cannot be both judge and party. No man can serve two masters. He that is intrusted with the interest of others cannot be allowed to make the business an object of interest to himself; because, from the frailty of nature, one who has the power will be too readily seized with the inclination to use the opportunity for serving his own interest at the expense of those for whom he is intrusted.

A creditor having taken out execution may buy the estate sold under the execution(h). Indeed this was never doubted where the transaction was a fair one. And the rule has never been applied to a purchase by mortgagee from the mortgagor, and it is to be hoped that it never will. In Ireland, many leases granted by mortgagors to mortgagees were set aside by Lord Redesdale, on the ground that the transaction was usurious, although that learned Judge's successors have not been inclined to carry the principle as far as he did. In one case(i) it was objected that the decision might tend to impeach dealings between mortgagor and mortgagee for a sale of the equity of redemption (330). But Lord Redesdale said, that to this a good answer was given at the bar. The cases are totally different; the parties stand in a different relation: if there be two persons ready to purchase, the mortgagee and another, the mortgagor stands equally between them; and if the mortgagee should refuse to convey to another purchaser, the mortgagor can compel him, by applying the purchase-money to pay off the mortgage. It can therefore only be for want of a better purchaser, that the mortgagor can be compelled to sell to the mortgagee: but Courts view transactions even of that

<sup>(</sup>h) Stratford v. Twynam, 1 Jac. 418.

<sup>(</sup>i) Webb v. Rorke, 2 Scho. & Lef. 673; and see 1 Ball & Beatty, 164; ex parte Marsh, 1 Madd. 148; see Chambers v. Waters, 3 Sim. 42.

<sup>(330)</sup> See Holridge v. Gillespie, 2 Johns. Ch. Rep. 30.

sort between mortgagor and mortgagee, with considerable (\*)jealousy, and will set aside sales of the equity of redemption, where, by the influence of his incumbrance, the mortgagee has purchased for less than others would have given, and there were circumstances of misconduct in his obtaining the purchase.

Perhaps the observation, that "Courts view transactions even of that sort between mortgagor and mortgagee, with considerable jealousy," puts the doctrine higher than one should wish to see it stand. A sale by a mortgagor to a mortgagee stands on the same principle as a sale between parties having no connection with each other, and can only be impeached on the ground of fraud: the mere circumstance that the mortgagee purchased for less than another would have given, would not of itself be a sufficient ground to impeach a sale; and Lord Redesdale, in stating that as an ingredient, adds also circumstances of misconduct in obtaining the purchase. Where a mortgagee sells under the general order in bankruptcy, it is usual to apply for leave for him to bid at the sale, where he intends to do so. But there he may fairly be considered as the seller, and he cannot, without the leave of the Court, sustain the two characters of seller and buyer(k). But if a mortgagee take a conveyance with a power of sale, he is a trustee for sale, and as such disabled from purchasing (l)(331).

The principle has, however, been extended to a purchase by an attorney from his client, while the relation subsists (m)(332).

<sup>(</sup>k) Exparte Du Cane, 1 Buck, 18. See ex parte Marsh, 1 Madd. 148.

<sup>(1)</sup> Downes v. Glazebrook, 3 Mer. 200.

<sup>(</sup>m) See Bellew v. Russell, 1 Ball & Beatty, 96; 9 Ves. jun. 296;

<sup>(331)</sup> But see Bergen v. Bennett, 1 Caines' Cas. in Error, 1.

<sup>(332)</sup> See Wendell v. Van Rensselaer, 1 Johns. Ch. Rep. 350.

<sup>(\*112)</sup> 

So a person chosen as an arbitrator, cannot buy up (\*)the unascertained claims of any of the parties to the reference: it would corrupt the fountain, and contaminate the award(n).

Where a person cannot purchase the estate himself, he cannot buy it as agent for another (o)(333), and perhaps cannot even employ a third person to contract or bid for the estate on behalf a stranger (p).

This general rule stands much more upon general principle, than upon the particular circumstances of any individual case. It rests upon this, that the purchase is not permitted in any case, however honest the circumstances; the general interests of justice requiring it to be destroyed in every instance; as no court is equal to the examination and ascertainment of the truth in much the greater number of cases(q).

The necessity of such a general rule is evinced by an instance mentioned by Lord Eldon, of a solicitor under a commission, who finding he could make a bargain to sell the estate for 1,400l. kept that in his own breast, and made a bargain with the assignees for the purchase of it at 350l(r).

In Davidson v. Gardner(s), Lord Hardwicke laid down the following rules as to a trustee purchasing of his cestui

13 Ves. jun. 138, as to gifts, which cite the early cases. And see Lord Selsey v. Rhoades, 2 Sim. & Stu. 41; Williams v. Llewellyn, 2 You. & Jer. 68; Champion v. Rigby, 1 Russ. & Myl. 539.

- (n) Blennerhasset v. Day, 2 Ball & Beatty, 116; Cane v. Lord Allen, 2 Dow, 289.
  - (o) See 9 Ves. jun. 248; ex parle Bennet, 10 Ves. jun. 381.
  - (p) See ex parte Bennet, ubi sup. sed qu.
  - (q) See 8 Ves. jun. 345, per Lord Eldon.
  - (r) See 8 Ves. jun. 349.
- (s) Chancery, 21st July 1743, MS. See Prestage r. Langford, infra; Lambert v. Bainton, 1 Cha. Ca. 199.

<sup>(333)</sup> See Davoue v. Fanning, 2 Johns. Ch. Rep. 252.
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que trust. 1st, That in all cases of a trustee purchasing of the cestui que trust, the Court will look upon it with a jealous eye. 2dly, It has been laid down as a general rule, that where a trustee for persons not sui juris, as infants and femes covert, becomes both buyer and seller, the Court will under no circumstances whatever, be they never so (\*) fair between the parties (as consulting the friends of the infant, or of their refusing to purchase, or the like), establish a purchase of that kind, unless the transaction is legitimated by the act of the Court, or some public act(334). And the reason is, because if such purchases were allowed, they would be liable to very great abuses; and this is the reason why the Court will not allow a trustee. any thing for his trouble. So, where a trustee renewed a lease in his own name, though it was proved that all the friends of the infant were consulted, and they refused to renew it, the Court decreed it to be in trust for the infant, though not the least unfairness appeared; which was the case of Rumford Market, before Lord King(t). But if a bill is brought, and a sale ordered, and notice of the sale before the Master, and the trustee purchases, the Court has refused to set such sale aside, all the other circumstances being fair. So where there was a public sale of an estate by proclamation in the country; which was the case of Saunders v. Burroughs, before the present Master of the Rolls; but if that had been a private sale, though the consent of all the relations was had, and no unfairness appeared, I think such a sale should be set aside, at least not carried into execution. But it might be inconvenient to extend the rule so far as to prevent a trustee from purchasing of one who was sui juris, where

<sup>(</sup>t) Keech r. Sandford, Sel. Cha. Ca. 61. See Lesley's case, 2 Freem. 52.

<sup>(334)</sup> See Davoue v. Fanning, 2 Johns. Ch. Rep. 252, 258. Jackson v. Woolsey, 11 Johns. Rep. 446.

<sup>(\*114)</sup> 

no unfairness appeared. And in the principal case, which was of a mixed kind, the defendant who had purchased being a trustee for the plaintiff, who was a feme covert, and had the estate to her separate use, and therefore in a court of equity considered as a feme sole, and sui juris, as to the disposal of her estate; Lord Hardwicke dismissed the bill, which was brought to set aside the assignment she had made of her interest in a brewhouse to the defendant; (\*)it appeared that she had received a full value, and no particular instances of fraud being proved.

From this case it appears that, in the time of Lord Hardwicke, a purchase by a trustee, even for infants, was deemed good, if the estate was sold by public auction, or before a master; but a purchase by a trustee, whether for adults or infants, cannot now be supported, although the estate be sold by public auction(u), or before a Master, under a decree for sale(x). Nor, indeed, ought the publicness of the sale to sustain a purchase, which cannot otherwise be supported. For the trustee may know not only the surface value, but that there are minerals, in which case he would buy upon the rent, and gain all that advantage(y). So there may be a great many clandestine dealings, which may bring it to a price far short of that which would be produced if full information was given(z).

But under particular circumstances, a purchase by a trustee or agent, before the Master, may be confirmed, although with great reluctance.

<sup>(</sup>v) York-Buildings Company v. Mackenzie, 8 Bro. P. C. 42; Whichcote v. Lawrence, 3 Ves. jun. 740; Campbell v. Walker, 5 Ves. jun. 678; Sanderson v. Walker, 13 Ves. jun. 601, S. C.; and ex parte James, 8 Ves. jun. 337; and see 10 Ves. jun. 393; Attorney-General v. Lord Dudley, Coop. 146.

<sup>(</sup>x) Price v. Byrn, 5 Ves. jun. 681, cited. See Cary v. Cary, 2 Scho. & Lef. 173.

<sup>(</sup>y) See 10 Ves. jun. 394.

<sup>(2)</sup> Sec 8 Ves. jun. 349.

Thus, in Wren v. Kirton(a), the facts were these: Upon a former sale before the Master, the sum of 23,000l. was bid by a person bidding bona fide. That sale was defeated by setting up a fictitious bidder. Afterwards the lot was again put up three times. On the two first occasions no more was offered than 12,000l. and 6,000l. At the last sale one Wilson was declared the purchaser at the sum of (\*)15,000l. He purchased as trustee for Wade, the agent

and manager of the colliery.

The Lord Chancellor said, if this had been an original sale, and the agent had purchased in the name of another person, very slight circumstances would have induced him, even at some risk, to set that aside; as it was the duty of Wade, if he meant to bid, to furnish all the knowledge he had to those who were to sell. The difficulty that pressed him was, the consequence, the danger of further loss by resale. He would (he added) not hesitate to open the sale if the least advance upon 15,000l. was offered; but without such an offer there was nothing leading him to suppose it would ever again reach the sum that was originally bid.—The Master's report of the best bidder was, with considerable reluctance, confirmed; unless, on or before the first seal, an application should be made to open the biddings, giving security to answer the difference between the produce of the resale and the sum of 15,000l. No security was however offered, and the agent completed the purchase.

In Oldin v. Samborne(b), Lord Hardwicke said, that it was improper for a guardian to purchase his ward's estate immediately on his coming of age; but though it has a suspicious look, yet if he paid the full consideration, it is not voluntary, nor can it be set aside. But it seems clear, that such a purchase would now be set aside

<sup>(</sup>a) See 8 Vez. jun. 593.

<sup>(</sup>b) 2 Atk. 15.

<sup>\*116</sup> 

on general principles, without reference to the adequacy of the consideration (c)(335).

It appears, however, that unless fraud can be proved, the circumstance of the purchaser being related to the trustee, agent or other person having a confidential character, (\*)cannot even be opposed as a bar to the aid of the Court in favor of the purchaser (336).

Thus, in Prestage v. Langford(d), the auctioneer's son, who was in partnership with his father, and another person, bought an estate sold by order of a trustee for infant legatees, and contracted to sell it a few days afterwards for 750l. more than they gave for it. But the proof of fraud being judged defective, the Court would not set aside the sale merely because one of the auctioneers was buyer and seller too, but decreed a specific performance, nevertheless, without costs; in order (as was said) to discourage all such suspicious transactions.

So, in the late case of Coles v. Trecothick(e), the trustee's father (for whom the trustee in this instance acted as agent), purchased an estate (which had been previously put up to sale by auction, and bought in) of the cestui que trust for 20,000l.; and as the cestui que trust had full knowledge of the value, &c. and he himself, and not the trustee, fixed the price, and consented to the sale, and no fraud was proved, a performance in specie was decreed; although the cestui que trust had since the contract been offered 5,000l. more for the estate.

It must, however, be observed, that the case of Prestage

- (c) See Dawson v. Massey, 1 Ball & Beatty, 219.
- (d) 3 Wood. 248, n. Chan. M. 11 Geo. 3.
- (e) 9 Ves. jun. 234; 1 Smith, 233.

<sup>(335)</sup> A guardian ad litem, in partition, may be a purchaser at a sale made by the commissioners, pursuant to an order of the court. Jackson v. Woolsey, 11 Johns. Rep. 446.

<sup>(336)</sup> See Franklin v. Osgood, on appeal, 14 Johns. Rep. 527.

v. Langford was decided before the broad rule which now prevails was laid down. Indeed that case is clearly overruled by later decisions, as the purchaser was in fact employed in the sale. And the decision in the case of Coles v. Trecothick does not seem to meet with the approbation of the Profession. But if, under the particular circumstances of this case, the Court had not compelled execution of the contract, it would certainly have been deciding, that neither a trustee himself, nor any one connected with him, or related to him, can buy of the cestui (\*)que trust, however fair and open the circumstances may be. Indeed, Lord Eldon seems to have founded his decision on the ground, that the trustee himself might have purchased the estate.

It may here be remarked, that where a power is given by a settlement to trustees to sell the estate with the consent of the tenant for life, or to the tenant for life to sell with the consent of the trustees, it is in practice considered, that the estate may be safely purchased by the tenant for life himself. Lord Eldon, although fully aware of the danger attending a purchase of the inheritance by a tenant for life, seems to think that it cannot be impeached on general principles(f). A few years ago, considerable doubt was entertained by the Profession, whether the power of sale and exchange, usually inserted in settlements of estates, authorized a sale or exchange to or with the tenant for life, or at least whether equity would not relieve against the transaction, and that doubt was stated as a ground for requiring the aid of Parliament, in a petition for an act to enable an exchange of settled estates with the tenant for life; which it was conceived could not be done under a power of sale and exchange in the settle-The Chief Baron, and Mr. Baron Hotham, to

<sup>(</sup>f) See 9 Ves. jun. 52; and 11 Ves. jun. 480; but sec ib. 476, 477.

<sup>(\*118</sup> 

whom the bill was referred, reported, and submitted it as their opinion, that the doubt which was the cause of petitioning for the bill was not well founded; and therefore the bill was unnecessary, and that the passing of such a bill might cause a great prejudice to numerous titles under executions of powers of sale and exchange of a similar kind: and the House of Lords accordingly rejected the bill; in consequence of which many estates of great value have been purchased, and taken in exchange by tenants for life, under the usual powers of sale and exchange. (\*)Since these observations were written, the point has again been agitated in practice. It is a point which no private opinion can put at rest, although, after the opinions of the Chief Baron and Mr. Baron Hotham, sanctioned by the House of Lords, and followed up in practice, there seems to be no ground to fear that a different rule will be established. The point has been decided by the Lord Chancellor since the above observations were written, in favor of the execution of the power(g), and the point, therefore, is now at rest.

II. The purposes for which estates are vested in trustees for sale, are generally either for the benefit of creditors; of individuals sui juris; or persons not sui juris; and we are now to consider in what manner trustees may become purchasers of estates vested in them for those several purposes, without being liable to be called to account for so doing.

Of purchases by trustees or other prohibited persons in general, it must previously be remarked, that the Court will not permit them to give up their office, and to bid, as it would lead to infinite mischief. The cestuis que trust themselves, as we shall see, can decide this; and no Court can say ab ante they will permit it: for circum-

<sup>(</sup>g) Howard v. Ducane, 1 Turn. 81; see Grover v. Hugell, 3 Russ. 428.

stances may exist at the time of the second sale that the Court cannot know(h).

1. With respect to a trustee for creditors purchasing the estate himself.

In Whelpdale v. Cookson(i), where a trustee for creditors purchased part of the estate himself, Lord Hardwicke said, if the *majority* of the creditors agreed to allow it, he should not be afraid of making the precedent (337).

But in a late case(k), Lord Eldon said, he doubted the (\*)authority of that case; for if the trustee is a trustee for all the creditors, he is a trustee for them all in the article of selling to others; and if the jealousy of the Court arose from the difficulty of the cestui que trust duly informing himself what is most or least for his advantage, he had considerable doubt whether the majority could in that article bind the minority.

It seems doubtful, therefore, whether the purchase can be supported unless all the creditors consent, although convenience, and the general rule of transactions by a body of persons, are strongly in favor of Lord Hardwicke's opinion.

2. With respect to a trustee for a person sui juris becoming the purchaser of the estate.

If a trustee even for a person *sui juris* purchase in the name of another person, the sale will be set aside, as that very circumstance carries fraud on the face of it(l)(338).

- (h) Ex parte James, 8 Ves. jun. 352.
- (i) 1 Ves. 9; 5 Ves. jun. 682, n.
- (k) See 6 Ves. jun. 628. See ex parte Bage, 4 Madd. 459.
- (l) Lord Hardwicke v. Vernon, 4 Ves. jun. 411; 14 Ves. jun. 504; and see 2 Bro. C. C. 410, n.

<sup>(337)</sup> See Davoue v. Fanning, 2 Johns. Ch. Rep. 259. See also, 1 Yeates, 312, 313.

<sup>(338)</sup> See 1 Peters' Rep. 368. M'Guire v. M'Gowen, 4 Des. 486. Moody's Les. v. Vandyke, 4 Binn. 43. Corbin v. Waller, 2 Hayw. 108.

<sup>(\*120)</sup> 

But it must not be understood that a trustee cannot buy from his cestui que trust; the rule is, that he cannot buy from himself(m). If, therefore, the cestui que trust clearly discharges the trustee from the trust, and considers him as an indifferent person, there is no rule which says that he may not purchase of him, although the Court will look with a very jealous eye on a transaction of that nature(n): and to be supported, it must clearly appear, that the purchaser, at the time of the purchase, had shaken off his confidential character, by the consent of the cestui que trust freely given, after full information, and bargained for the right to purchase(o)(339).

So an attorney is not incapable of contracting with his client, but the relation must be in some way dissolved, or, (\*) if not, the parties must be put so much at arm's length, that they agree to take the character of purchaser and vendor; and you must examine whether all the duties of those characters have been performed. If an attorney deal with his client, he should require him to get another attorney to advise with him as to the value, or, if he will not, then out of that state of circumstances, this clear duty results from the rule of equity, and throws upon him the whole onus of the case; that if he will mix with the character of attorney that of vendor, he shall, if the propriety of the contract comes in question, manifest that he had given his client all that reasonable advice against himself that he would have given him against a third person(p). So if an attorney be employed as agent in

<sup>(</sup>m) 10 Ves. jun. 246; and see Ayliffe v. Murray, 2 Atk. 58; Crowe v. Ballard, 3 Bro. C. C. 117; 1 Ves. jun. 215.

<sup>(</sup>n) See 6 Ves. jun. 627.

<sup>(</sup>o) See 8 Ves. jun. 353.

<sup>(</sup>p) Gibson v. Jeyes, 6 Ves. jun. 266; sec p. 277, 278, per Lord Eldon, C.; Wood v. Downes, 18 Ves. jun. 120; Montesquieu v. Sandys, ibid. 302.

<sup>(339)</sup> See Davoue v. Fanning, 2 Johns. Ch. Rep. 259, 260. VOL. 11. (\*121)

the management of a landed estate, he cannot deal with his principal for that estate without honestly communicating to the principal all the knowledge respecting its value which he had acquired as his agent, and unless he do this, the contract, if questioned, cannot be supported(q).

And the same circumstances that will authorize a trustee to contract for himself will enable him to purchase as

the agent of another (r).

3. With respect to a trustee for a person not sui juris buying the estate himself.

The only mode by which this can be effected, so as to protect the purchaser, is, if he sees that it is absolutely necessary the estate should be sold, and he is ready to give more than any one else, that a bill should be filed, and he should apply to the Court by motion to let him be the purchaser. This is the only way he can protect himself; (\*) and Lord Alvanley said there are cases in which the court would permit it; as if only 500l, was offered, and the trustee will give 1,000l(s).

III. It remains to consider what remedy the cestui que trust has, where his trustee has purchased the trust-estate in a manner not authorized by the rules of the Court. It may be premised, that this remedy goes precisely to the same persons who were entitled to the estate before the sale. Therefore, a man having a legal or equitable mortgage on the estate, which was not satisfied by the money produced by the sale, may pursue the remedy afforded by equity against the trustee. And the circumstance of the mortgagee having been present at the sale, where he bid

(r) See 9 Ves. jun. 248.

<sup>(</sup>q) Cane v. Lord Allen, 2 Dow, 289, per Lord Eldon, C.

<sup>(</sup>s) Campbell v. Walker, 5 Ves. jun. 678; 13 Ves. jun. 601; see 1 Ball & Beatty, 418.

<sup>(\*122)</sup> 

for the estate, is no objection to his claim against the owner of the estate, where he (the owner) has himself set aside the sale and derived any advantage from it(t).

If the trustee has not sold the estate, the *cestui que* trust may insist on the purchase being avoided, and may reclaim his estate(u); for it need not be shown that the trustee has made an advantage(x).

If the cestui que trust require a re-conveyance of the estate, he must repay to the trustee the original price of the estate, and also all sums laid out for permanent benefit and improvement of the estate, and interest thereon from the times they were actually disbursed; and, on the other hand, the trustee must pay and allow all the rents received by him, and the yearly value of such parts as have (\*)been in his own occupation, and all sums received by the sale of timber or other parts of the inheritance, and interest thereon, from the times of their being received. This was decided in the great case of York-Buildings Company v. Mackenzie, in the House of Lords(y); and it appears that the House allowed him the value of improvements of all kinds, even in the instance of a mansion-house erected, and plantations of shrubs, &c(z).

And where the cestui que trust is not desirous to take back the estate, he may require it to be put up to sale again at the price at which it was bought by the trustee: and that if any one bid more, the trustee shall not have

<sup>(</sup>t) Ex parte Lacey, 6 Ves. jun. 625; 12 Ves. jun. 8; ex parte Morgan, 12 Ves. jun. 6.

<sup>(</sup>u) See 6 Ves. jun. 627; York B. C. v. Mackenzie, 8 Bro. P. C. 42; Lord Hardwicke v. Vernon, 4 Ves. jun. 411; Randall v. Errington, 10 Ves. jun. 423.

<sup>(</sup>x) See 8 Ves. jun. 348; 10 Ves. jun. 385, 393.

<sup>(</sup>y) 8 Bro. P. C. 42.

<sup>(</sup>z) See 6 Ves. jun. 624. This must have been decided in some of the subsequent appeals; See 8 Bro. P. C. 71, note.

the estate: but if not, that he may be compelled to keep

it(a)

If, however, the cestui que trust be desirous to have the estate put up in lots, and it was bought by the trustee in one lot, he must either repay the trustee the purchasemoney with such interest as he would have been liable to pay upon his bargain, he accounting for the rents received, or paying an occupation-rent for the estate, if he personally occupied it: or the cestui que trust must consent to have the estate put up in one lot on the terms before mentioned (b).

The trustee will, in case of a resale, be allowed any money bona file laid out, not only in substantial repairs and improvements, but also in such as have a tendency to bring the estate to a better sale; which will be added to the amount of the purchase-money, and the estate will be put up at the aggregate sum; deducting, however, (\*) an allowance for acts that deteriorate the value of the estate(c)(340).

If any old buildings have been pulled down by the purchaser, and new ones erected, the old buildings, if incapable of repair, will be valued as old materials, but otherwise as buildings standing(d).

But no allowance will be made him for any loss he may sustain by a fall in the funds(e).

Formerly where a purchase by a trustee was set aside,

(a) Ex parte Reynolds, 5 Ves. jun. 707; ex parte Hughes, ex parte Lacey, and Lister v. Lister, 6 Ves. jun. 617, 625, 631.

(b) Ex parte James, 8 Ves. jun. 337.

- (c) Ex parte Hughes, 6 Ves. jun. 617; ex parte Bennet, 10 Ves. jun. 381.
  - (d) 6 Madd. 2.
  - (e) Ex parte James, ubi sup.

<sup>(340)</sup> See Dilworth v. Sinderling, 1 Binn. 488, 495. Green v. Winter, 1 Johns. Ch. Rep. 39, 40. Methodist Episcopal Church v. Jaques, 1 Johns. Ch. Rep. 450. Southgate v. Taylor, 5 Munf. 420. (\*124)

the rule was, to put up the estate again to be sold to the best bidder; the trustee accounting for the profits, and being allowed his principal money and interest at 4 per cent(f).

If the trustee has actually sold the estate, the *cestui* que trust may compel the trustee to pay him what he may have received above the original purchase-money(g)(341).

Where a trustee buys the trust-estate at a fair price, the sale is seldom called in question, unless he afterwards sell it to advantage; and then the *cestui que trust* is of course only desirous that the money gained by the trustee on the resale should be paid to him.

Owing to this circumstance, a purchaser of a trust-estate from a trustee who had previously sold to himself, is seldom implicated in the suit; but it seems clear that a person purchasing with notice of the previous transaction would be liable to the same equity as the trustee was subject to (342). In the late case of Randall v. Errington(h), a purchaser from a trustee who had purchased in the name of a trustee was made a defendant, and the (\*)prayer of the bill was, that if he purchased without notice, the trustee might account for the money gained by the resale; but as the equity against the purchaser was not noticed either by the counsel or the court, it must be presumed that no notice was proved. A different rule would, to use the expression of a great man, blow up like gunpowder this branch of equitable jurisdiction. It is

<sup>(</sup>f) See Whelpdale v. Cookson, 1 Ves. 9; 5 Ves. jun. 682, n.

<sup>(</sup>g) Fox v. Macreth, 2 Bro. C. C. 400; ex parte Reynolds, 5 Ves. jun. 707.

<sup>(</sup>h) 10 Ves. jun. 423.

<sup>(341) &</sup>quot;No profit, gain, or advantage, shall be derived to the trustee, from his use of the trust funds. All the gain must go the cestui que trust." Per KENT, Schieffelin v. Stewart, 1 Johns. Ch. Rep. 625. See Brown v. Rickets, 4 Johns. Ch. Rep. 303.

<sup>(342)</sup> See Murray v. Ballou, 1 Johns. Ch. Rep. 574, 575.

indeed true, that in the case in the House of Lords, the proceedings in the Court of Sessions were reversed without prejudice to the titles and interests of the lessees and others who might have contracted with the defendant bona fide, and before the dependence of the process(I). But this may be satisfactorily accounted for on two grounds: the one, that no notice was charged on the lessees, nor were the leases attempted to be impeached; the other, that the relief sought had been delayed for many years, and the point established by the House of Lords was, to say the least, a new doctrine with reference to Scotland. But this equity is now well established. No person, therefore, can be advised to become the purchaser of an estate so circumstanced, unless the cestui que trust will join; nor would a court of equity, on any other terms, enforce a specific performance of such a contract. But this doctrine cannot be extended to the mere case of a purchase by a trustee in his own name, from his cestui que trust, which may or may not be binding, according to circumstances, unless the purchaser have also notice that the sale was not such as could be supported in equity.

Before closing this chapter it must be remarked, that if a cestui que trust acquiesce for a long time in an improper purchase by his trustee, equity will not assist him to set (\*) aside the sale(i). In Price v. Byrn(k), Lord Alvanley

<sup>(</sup>i) See ex parte James, 8 Ves. jun. 337; Hall v. Noyes, 3 Ves. jun. 748, cited; and see 11 Ves. jun. 226; Morse v. Royal, 12 Ves. jun. 355; Medlicott v. O'Donel, 1 Ball & Beatty, 156; Champion v. Rigby, 1 Russ. & Myl. 539.

<sup>(</sup>k) 5 Ves. jun. 681, cited; and see Norris v. Neve, 3 Atk. 26; Gregory v. Gregory, Coop. 201.

<sup>(</sup>I) And see the same rule as to under-leases of a charity-estate, where the original lease is set aside as improvident. Attorney-General v. Griffith, 13 Ves. jun. 565; Attorney-General v. Backhouse, 17 Ves. jun. 283.

<sup>(\*126)</sup> 

refused the aid of the Court, because the bill had been delayed twenty years(I)(343).

But laches do not apply to a body of creditors, who may, therefore, claim the aid of equity at a much more distant period after the sale than an individual can(l).

And although acquiescence may have the same effect as original agreement, and may bar such a remedy as this, yet the question as to acquiescence cannot arise until it is previously ascertained that the cestui que trust knew his trustee had become the purchaser: for, while the cestui que trust continued ignorant of that fact, there is no laches in not quarrelling with the sale upon that special ground(m).

A purchase by a trustee from his cestui que trust is merely malum prohibitum, and not malum in se. It is one of those contracts which admit of confirmation by the injured party. But to give effect to a confirmation in a case like this, the party confirming must not be under the control of the person whose title is to be confirmed, and he must have a full knowledge of all the circumstances, and of his power to set aside the former transaction(n).

<sup>(1)</sup> Whichcote v. Lawrence, 3 Ves. jun. 740; and a case before the Court of Exchequer, 6 Ves. jun. 632, cited; York-Buildings Company v. Mackenzie, 8 Bro. P. C. by Tomlins, 42.

<sup>(</sup>m) Per Sir William Grant, 10 Ves. jun. 427; and see 2 Ball & Beatty, 129.

<sup>(</sup>n) Morse v. Royal, 12 Ves. jun. 355; Murray v. Palmer, 2 Scho.
& Lef. 474; Roche v. O'Brien, 1 Ball & Beatty, 330; Wood v. Downes, 18 Ves. jun. 120; Dunbar v. Tredennick, 2 Ball & Beatty, 304. Vide supra, Vol. 1, p. 265; Cockerell v. Cholmeley, 1 Russ. & Myl. 418; Small v. Attwood, 1 Yo. Rep. 407.

<sup>(</sup>I) See now 3 & 4 Will. 4, c. 27, s. 24, 25, 26, 27.

<sup>(343)</sup> See Bergen v. Bennett, 1 Caines' Cas. in Error, 1. Jackson v. Walsh, 14 Johns. Rep. 407.

# (\*)CHAPTER XV.

OF JOINT PURCHASES; PURCHASES IN THE NAMES OF THIRD PERSONS; AND PURCHASES WITH TRUST-MO-NEY: AND OF THE PERFORMANCE OF A COVENANT TO PURCHASE AND SETTLE AN ESTATE.

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#### SECTION I.

Of Joint Purchases.

Where two or more persons purchase lands, and advance the money in equal proportions, and take a conveyance to them and their heirs, this is a joint tenancy, that is, a purchase by them jointly of the chance of survivorship, which may happen to the one of them as well as to the other (a)(1)(344), but where the proportions of

(a) See Moyse v. Gyles, 2 Vern. 385; York v. Eaton, 2 Freem. 23; Thicknesse v. Vernon, 2 Freem. 84; Anon. Carth. 15; and see 3 Atk. 735; 2 Ves. 258; Rea v. Williams, MS. Appendix, No. 23; Aveling v. Knipe, 19 Ves. jun. 441.

<sup>(344)</sup> See Caines v. Grants' Les. 5 Binn. 119. Cuyler v. Bradt, 2 Caines' Cas. in Error, 326. Higbee v. Rice, 5 Mass. Rep. 344, 350. Martin v. Smith, 5 Binn. 16.

<sup>(</sup>I) This distinction has not been thought satisfactory. A writer, to whom the Profession is under great obligation, observes, that if the advance of consideration, generally, will not prevent the legal right, the mere inequality of proportion, which may naturally be attributed to the (\*127)

the (\*)money are not equal, and this appears in the deed itself, this makes them in the nature of partners(b); and however the legal estate may survive, yet the survivor shall be considered but as a trustee for the others in proportion to the sums advanced by each of them. So if two or more make a joint purchase, and afterwards one of them lays out a considerable sum of money in repairs or improvements, and dies, this shall be a lien on the land, and a trust for the representative of him who advanced it(c).

And where the money is advanced in equal proportions, so that the purchasers are joint tenants in equity as well as at law, a conveyance by the purchasers to a trustee without any consideration, and without any express intent to sever the joint tenancy, will not have that effect; but the trust estate will go to the survivor in the same manner as the legal estate would have done(d).

In all cases of a joint undertaking, or partnership, although the estate will survive at law, yet the survivor will in equity be a trustee for the representative of the deceased partner (345).

- (b) See 2 Ves. 258.
- (c) Per Master of the Rolls, in causa Lake v. Gibson, 1 Eq. Ca. Abr. 290, pl. 3.
  - (d) Rea v. Williams, MS. Appendix, No. 21.

(345) See Duncan v. Forrer, 6 Binn. 193, 196.

relative value of the lives, cannot have that effect. See 9 Ves. jun. 597, n. (b). The distinction, however, seems founded on rational grounds. Where the parties advance the money equally, it may be fairly presumed that they purchased with a view to the benefit of survivorship; but where the money is advanced in unequal proportions, and no express intention appears to benefit the one advancing the smaller proportion, it is fair to presume that no such intention existed; the inequality of proportion can scarcely be attributed to the relative value of the lives, because neither of the parties can be supposed not to know, that the other may, immediately after the purchase, compel a legal partition of the estate, or may even sever the joint-tenancy by a clandestine act.

Thus, in a case(e) where five persons purchased lands in fee of the commissioners of sewers, and in order to improve and cultivate these lands afterwards entered into articles, whereby they agreed to be equally concerned as to profit and loss, and to advance each of them such a (\*)sum, to be laid out in the manurance and improvement of the land, it was held by the Master of the Rolls that they were tenants in common, and not joint tenants, as to the beneficial interest, and that the survivor should not go away with the whole; for then it might happen that some might have paid or laid out nothing, go away with the whole. And the decree was affirmed by Lord Chancellor King(f).

So where two persons took a building-lease, and laid out money in erecting houses, they were held to be partners with respect to this property: and the survivor was decreed to be a trustee of a moiety for the representatives of the deceased(g).

But as the lands will survive at law, equity, on the general rule that he who seeks equity shall do equity, will not relieve, unless the person seeking relief will do what he equitably ought to do.

Thus, in the first-mentioned case, the ancestor of the party seeking relief had quitted the concern for many years; since which time the other proprietors, to enable them to carry on their design, had purchased some other estates, which proved a losing concern; and the plaintiff was only relieved on contributing his share of the pur-

<sup>(</sup>e) Lake v. Gibson, ubi sup. and see Hays v. Kingdome, 1 Vern.33; Jeffereys v. Small, 1 Vern. 217.

<sup>(</sup>f) Lake v. Craddock, 3 P. Wms. 158; S. C. MS.; Morris v. Barrett, 3 You. & Jerv. 384.

<sup>(</sup>g) Lyster v. Dolland, 1 Ves. jun. 431. See 2 Ves. jun. 631; and Elliot v. Brown, 9 Ves. jun. 597, cited.

<sup>(\*129)</sup> 

chase-money of the estates so bought, with interest from the time the money ought to have been paid(h).

Lord Chancellor King said, that this was plainly a tenancy in common in equity, though otherwise at law; and the defendant Craddock having only a title in equity, that he must do equity; and that this was equitable in all (\*)its branches; for he had his election to drop all claim, or to take it on the same foot with the rest of the partners; and that it was not reasonable that he should be let into the account of the profits or loss of the undertaking until he had made his election(i).

If it be doubtful whether the purchasers bought the property to carry on trade, an inquiry will be directed before the Master to ascertain the fact(j)(1).

Where two or more persons agree for the purchase of an estate in moieties between them, subject to incumbrances, which are to be discharged out of the purchasemoney, the purchase is in equity considered to be made for their equal benefit, and on a mutual trust between them; and therefore, although one of them may have abatements made to him by some of the incumbrancers, of sums due for interest or otherwise, in consideration of services and friendship, and it is expressly agreed to be to his own use, yet equity will compel him to account to the other for the benefit of these advantages(k).

So a new lease obtained by one partner shall enure to

- (h) And see Senhouse v. Christian, 19 V es. 157, cited.
- (i) MS. The judgment is not stated in any other printed book.
- (j) See 1 Ves. jun. 435.
- (k) Carter v. Horne, 1 Eq. Ca. Abr. 7, pl. 13.

<sup>(</sup>I) Whether the property as between the representatives shall be deemed real or personal, see Bell v. Phyn, 7 Ves. jun. 453; Bateman v. Shore, 9 Ves. jun. 500; Mackintosh v. Townsend, 1 Mont. Partn. notes, 97; Selkrig v. Davies, 2 Dow. 231.

both (l), although he obtained it claudestinely and on his own account (m).

If two persons purchase an estate subject to a mortgage, and the mortgage-money is apportioned between them, and each of them covenants with the other to pay his share of the money, and to indemnify the other from it, (\*)they do not by those means make their personal estate, as between their real and personal representatives, the primary fund for payment of the mortgage-money(n).

It seems that where two or more persons purchase an estate, and one, for instance, pays all the money, and the estate is conveyed to them both, the one who paid the money cannot call upon those who paid no part of it to repay him their shares of the purchase-money, or to convey their shares of the estate to him: for by payment of all the money he gains neither a lien nor a mortgage, because there is no contract for either; nor can it be construed a resulting trust, as such a trust cannot arise at an after-period; and perhaps the only remedy he has, is to file a bill against them for a contribution(o). Whenever, therefore, two persons agree to purchase an estate, it should be stipulated in the agreement, that if by the default of either of them the other shall be compelled to pay the whole, or greater part of the purchase-money, the estate shall be conveyed to him, and he shall hold the entirety against the other and his heirs, unless he or they shall, within a stated time, repay the sum advanced on their account, with interest in the mean time.

(m) Featherstonhaugh v. Fenwick, 17 Ves. jun. 298.

<sup>(1)</sup> Burroughs v. Elton, 11 Ves. jun. 29.

<sup>(</sup>n) Forrester v. Lord Leigh, Ambl. 171. Vide supra, vol. 1, p. 188.

<sup>(</sup>o) See Wood v. Birch, and Wood v. Norman, Rolls, 7 and 8 March 1804; the decree in which case does not, however, authorize the observation, but the author conceives it to follow, from what fell from the Master of the Rolls at the hearing.

<sup>(\*131)</sup> 

But it has been held, that if one of two joint tenants of a lease renew, at his own expense, and the other party reap the full benefit of it, the one advancing the money shall have a charge on the other moiety of the estate, for a moiety of his advances on account of the fines, although such other moiety of the estate be in strict settlement at the time of the renewal. The case was considered to (\*) fall within the principle upon which mortgagees who renew leasehold interests have been decreed entitled to charge the amount upon the lands (p).

Where two or more persons purchase an estate, and the conveyance is taken in the name of one of them, the trust may be proved by letters written subsequently to the purchase; for the statute of frauds(q) does not require that a trust shall be created by a writing(r)(346); but that it shall be manifested and proved by writing, which means that there should be evidence in writing, proving that there was such a trust(s)(347).

But although two persons enter into a treaty for the purchase of an estate, and one of them desists, and permits the other to go on with the intended purchase, on his promising, by parol, to let him have the part of the estate he desired, yet it seems that this agreement cannot be enforced on account of the statute of frauds (348).

In Lamas v. Baily(t), which was a case of this nature, the plaintiff obtained a decree at the Rolls, it being in-

- (p) Hamilton v. Denny, 1 Ball & Beatty, 199.
- (q) 29 Car. 2, c. 3, s. 7.
- (r) See n. (1) to the last edit. of Gilb. on Uses, p. 111.
- (s) Forster v. Hale, 3 Ves. jun. 696; 5 Ves. jun. 308; Randall v. Morgan, 12 Ves. jun. 67.
  - (t) 2 Vern. 627; and see Riddle v. Emerson, 1 Vern. 106.

<sup>(346)</sup> See Boyd v. M'Lean, 1 Johns. Ch. Rep. 582. Botsford v. Burr, 2 Johns. Ch. Rep. 405, 409.

<sup>(347)</sup> See Movan v. Hays, 1 Johns. Ch. Rep. 339.

<sup>(348)</sup> See Henderson v. Hudson, 1 Munf. 510.

sisted, that although it was an agreement parol, yet it was in part executed by the plaintiff's desisting from prosecuting his purchase, who otherwise might have purchased for himself, or at least have enhanced the price the defendant was to pay, so that the defendant had a benefit by it; and besides, it was a fraud(u), and like the case where a man agreed to purchase as agent for another, and would afterwards retain the purchase to himself. But upon an appeal to the Lord Chancellor, the decree was (\*)reversed, as being a parol agreement within the provision of the statute against frands.

Mr. Powell(x) refers to an anonymous case in Viner(y), which he conceives to be another report of the case of Lamas v. Baily, where the Lord Chancellor dismissed the bill because there was no absolute and positive agreement; but the words were ambiguous and uncertain, and the statute intended to oust as well all such ambiguous agreements, as to prevent perjuries, &c., and this agreement would not bind, unless it were in writing. And Mr. Powell, therefore, conceives that the judgment turned on there being no absolute or positive agreement, the words being ambiguous and uncertain; and not on the ground that the forbearing by agreement to do an act might not be a part performance, and raise as strong an equity to have the benefit stipulated in return, as an act done.

In the later case of Atkins v. Rowe(z), some persons desirous of obtaining a lease of three houses, agreed that one of them should bid for all the houses, but that the lease should be for their joint benefit. Accordingly he bid, and a lease was made to him; and to a bill filed by

<sup>(</sup>u) See Thynn v. Thynn, 1 Vern. 296.

<sup>(</sup>x) 1 Powell on Contracts, 310.

<sup>(</sup>y) 5 Vin. Abr. 521, pl. 32. Note, the case of Lamas v. Baily is stated in the same page.

<sup>(</sup>z) Mose. 39; and see Crop v. Norton, stated infra. (\*133)

the others to have the benefit of the lease, and that the purchaser might be decreed a trustee, he pleaded the statute of frauds in bar both to the discovery and relief. But the Lord Chancellor seemed of opinion, that the agreement, although by parol, was not within the statute, and ordered the plea to stand for an answer, with liberty to except, and the benefit of the plea to be saved to the hearing. Thus the case is reported in Moseley. It appears from the cases in the House of Lords(a), that the (\*)defendant by his answer denied the agreement, and the cause being at issue, several witnesses were examined on both sides. There was a contrariety of evidence, but the plaintiff proved the agreement by one positive witness, corroborated by circumstances. But the Chancellor dismissed the bill without costs, and his decree was affirmed by the House of Lords.

Upon the whole, therefore, the better opinion perhaps is, that an agreement of this nature cannot be enforced, although certainly it does not appear that the precise point has ever been decided upon an absolute agreement clearly and undeniably proved.

From the case of Smith, treasurer of the West-India Dock Company v, the Mayor and Corporation of London(b), it should seem, that where two persons agree to purchase an estate, and one of them, by agreement between them, completes the purchase, and pays the money, the other must agree to accept the title, and pay his share of the purchase-money, before he can call for an inspection of the title-deeds, in order to investigate the title; unless the one who purchased can be charged with such gross negligence, or wilful default, as will strip an agent, as such, of the protection which that character gives him

<sup>(</sup>a) Cases, Dom Proc. 1730.

<sup>(</sup>b) Ch. Dec. 16, 1801, and many previous days, MS.

in all transactions in which he duly acts according to his agency: and in case any such gross negligence or wilful default can be proved, the injured party will have a remedy in equity, although he may have paid his share of the purchase-money.

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#### SECTION II.

Of Purchases in the Names of Third Persons.

I. If a man purchase an estate, and do not take the conveyance in his own name only, the clear result of all (\*)the cases, without a single exception, is, that the trust of the legal estate, whether freehold, copyhold or leasehold; whether taken in the name of the purchaser and others jointly, or in the names of others, without that of the purchaser; whether in one name or several; whether jointly or successive, results to the man who advances the purchase-money(c)(349), unless such a resulting trust would break in upon the policy of an act of parliament(d). And although the person in whose name the conveyance is taken executes no declaration of trust, yet a trust will result for the person who paid the money by operation of

<sup>(</sup>c) Per Lord C. B. Eyre, in Dyer v. Dyer, stated infra.

<sup>(</sup>d) See ex parte Houghton, 17 Ves. jun. 251; and see Redington v. Redington, 3 Ridg. P. C. 106.

<sup>(349)</sup> See Boyd v. M'Lean, 1 Johns. Ch. Rep. 582, 586. Botsford v. Burr, 2 Johns. Ch. Rep. 405. Cox v. Grant, 1 Yeates, 166. Foote v. Colvin, 3 Johns. Rep. 216. Les. of German v. Gabbald, 3 Binn. 302.

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law; this species of trust being expressly excepted out of the statute of frauds(e)(1)(350).

But, unless the trust arise on the face of the deed itself, the proofs must be very clear(f)(351): and however clear

- (e) 29 Car. 2, c. 2, s. 8. See Hungate v. Hungate, Toth. 184; Gascoigne v. Thwing, 1 Vern. 366; Howe v. Howe, 1 Vern. 415; Anon. 2 Ventr. 361, n. (3); O'Hara v. O'Neil, 21 Vin. Abr. 497, n.; 2 Bro. P. C. 39; Pelly v. Maddin, 21 Vin. Abr. 498, pl. 15; Sir Darcy Lever v. Andrews, 7 Bro. P. C. by Tomlins, 288; Ambrose v. Ambrose, 1 P. Wms. 321; ex parte Vernon, 2 P. Wms. 549; Smith v. Baker, 1 Atk. 385; Lloyd v. Spillet, 2 Atk. 148; Withers v. Withers, Ambl. 15; Lade v. Lade, 1 Wils. 21; Smith v. Lord Camelford, 2 Ves. jun. 713; Rider v. Kidder, 10 Ves. jun. 360.
- (f) Gascoigne v. Thwing, 1 Vern. 366; Newton v. Preston, Prec. Cha. 103; Willis v. Willis, 2 Atk. 71; and see 1 Atk. 60; Ambl. 414; Acherley v. Acherley, 4 Bro. P. C. 67; and Smith v. Wilkinson, 3 Ves. jun. 705, cited; and 1 Dick. 328; and see Lench v. Lench, 10 Ves. jun. 511; Groves v. Groves, 3 You. & Jerv. 163.

In Seward v. Jackson, 8 Cowen, 406. (in error,) where E. sold two acres of land to S., on his own credit, taking his bond for the purchase money; but S. subsequently paid the bond; held, that this did not raise a resulting trust. (Per Spencer, Senator). So, in Botsford v. Burr, 2 J. Ch. R. 409. Ch. Kent, in respect to such a question says, "nor would a subsequent advance of money to the purchaser, after the purchase is complete and ended, alter the case. It might be evidence of a new loan, or be the ground of some new agreement; but it would not attach by relation, a trust to the original purchase; for the trust arises out of the circumstance, that the monies of the real, not the nominal purchaser, formed, at the time, the consideration of that purchase, and became converted into the land."

(351) See Boyd v. M'Lean, ut supra. Snelling v. Utterback, 1 vol. 11.

<sup>(</sup>I) See 1 Will. c. 60, s. 16, for a provision against the infant heir-at-law of a nominal purchaser; and supra, vol. 1, p. 182.

<sup>(350)</sup> See Boyd v. M'Lean, Botsford v. Burr, German v. Gabbald, and Foote v. Colvin, ut supra. Jackson v. Sternbergh, 1 Johns. Cas. 153. Jackson v. Matsdorf, 11 Johns. Rep. 91. Jackson v. Mills, 13 Johns. Rep. 463. Jackson v. Morse, 16 Johns. Rep. 197, 199. Wallace v. Duffield, 2 Serg. & Rawle, 526. M'Guire v. M'Gowen, 4 Des. 486.

they may be, it seems doubtful whether parol evidence is admissible against the answer of the trustee denying the (\*)trust(g)(352). And in cases of this nature the claim-

(g) Skett v. Whitmore, 2 Freem. 289; Newton v. Preston, Prec. Cha. 103. See Cottington v. Fletcher, 2 Atk. 155; Bartlett v. Pickersgill, 4 East, 577, n. (b).

Bibb, 609. Foote v. Colvin, 3 Johns. Rep. 222. Botsford v. Burr, 2 Johns. Ch. Rep. 409. Wallace v. Duffield, 2 Serg. & Rawle, 527.

(352) Held to be admissible, in Boyd v. M'Lean, 1 Johns. Ch. Rep. 582.; and Snelling v. Utterback, 1 Bibb, 609. But in such case, parol evidence is to be received with great caution. Boyd v. M'Lean, ut supra.

By the principles of the common law there was no process but against legal estates, so that uses and trusts, and equities of redemption, and all merely equitable interests in lands or personal property, were considered only as creatures of equity, and were not liable to be taken and sold on execution. Equitable interests are only to be reached by resorting to a court of equity; and where it is clothed with sufficient powers to grant relief in all cases, creditors cannot be prejudiced. But this defect of the common law, cannot be supplied in all cases by the limited powers of this court in equity. Per Wilde, J. in Russel v. Lewis, 8 Pick. 508, where it was decided that the interest of a cestui que trust was not liable to be extended by execution; because in Massachusetts there is no statute making trust estates chargeable with the debts of the cestui que trust. The estate in question had been set off to the demandant to satisfy an execution; but it appeared that the demandant was only a nominal plaintiff in the action; one B. being in equity entitled to the fruits of the judgment. "This, said the same learned judge in delivering the judgment of the court, was not a trust or use executed by the statute of uses, (27 Hen. 8, c. 10,) but a trust according to the understanding of the term since the passing of the statute. In the present case relief may probably be had, if the tenant can show himself entitled to relief by the rules of equity, as the declaration of trust was made by deed. By the 10th section of the Eng. st. of frauds (29 Car. 2. c. 3.) trust estates were made liable to execution for the debts of the cestui que trust, but this statute did not extend to the provinces nor was it ever adopted in this State. The case of Smith v. Lane et al. 3 Pick. 205. decided that a trust could only be shown by writing; parol evidence was not admissible. But where an absolute conveyance was made upon the loan of money and the grantee subsequently executed a bond to the grantor to reconvey on payment of (\*136)

ant, in opposition to the legal title, should not delay asserting his right, as a stale claim would meet with little attention(h).

(h) Delane v. Delane, 7 Bro. P. C. by Tomlins, 279.

the money; a creditor of the grantee having sued out a foreign attachment against the grantor was declared to be entitled to recover; the latter having sold the land for a larger amount than the loan. He held the land until the sale, and the proceeds afterwards, as the trustee of the principal, for the payment of the debt to himself and such expenses as he had a right to charge, and for the use of the principal as to any surplus. Richards v. Allen et al. 8 Pick. 405. So, in Arms v. Ashley, 4 ib. 71, where the rents and profits of land were levied on to satisfy an execution; and the judgment creditor signed a writing engaging to pay the plaintiff the surplus rent after payment of his demand: held, that the plaintiff was entitled to recover the surplus money out of the hands of the defendant, who held the land under color of descent; the writing though not under seal is a sufficient declaration of a trust within our statute, agreeably to the decision in Barrell v. Joy, 16 Mass. 221. where certain expressions used by Joy in a pamphlet which he published in reply to one previously published by the complainants, were considered as amounting to an acknowledgment that the estates and property, which he received from Barrell, were entrusted to him for certain purposes; and that he was accountable to the latter for a just distribution of them; and for any balance remaining after the purposes of the trust were fully answered. Letters and other papers, any declaration in writing however informal, made by the grantee or assignee of property, at any time after the conveyance, is competent to show a trust according to the terms of such a declaration.

In Harrison v. M'Mennomy et al. 2 Edw. Ch. R. 251, where a trust was created for the benefit of certain children merely by a deposit of money in the hands of a third person; and the latter executed his bond and mortgage to the children: held that this money notwithstanding remained the property of the person depositing it; and subject to her bequest. The V. Ch. observed that "parol evidence is admissible to prove a trust in opposition to an absolute deed or written instrument: but it must be evidence of so positive a character as to leave no doubt of the fact, and, at the same time, so clearly define the trust as that the Court may see what is requisite for its due execution. There can be no doubt a trust was created for the benefit of the children upon placing the money in the hands of the defendant: for it was not a loan of mo-

It has been said(i), that if the consideration-money is expressed in the deed to be paid by the person in whose name the conveyance is taken, and nothing appears in such a conveyance to create a presumption that the purchase-money belonged to another, then parol proof cannot be admitted, after the death of the nominal purchaser, to prove a resulting trust; for that would be contrary to the statute of frauds and perjuries (353).

This proposition has been adopted by another writer (k), who says, that it should seem, that even the confession of the trust by the nominal purchaser, to countervail a declaration in writing, and create a trust for the party advancing the money, cannot be established by a third person, but must be made under a judicial examination upon oath, or by the party's own answer in equity. This, he adds, seems understood both in the case of Ambrose

- (i) See Mr. Sanders's note to Lloyd r. Spillet, 2 Atk. 150; and see his Essay on Uses, I. 123; and see the 3d edit. of that work, p. 259, 260.
  - (k) Rob. on Stat. of Frauds, 99.

ney to be repaid by him as borrower, but the same was a special deposit for the purposes of investment and accumulation—the fund not being distributable until the youngest child attained the age of twenty-one years. The number of parts into which the fund was then to be divided is left uncertain by the parol evidence. The trust restricting the distribution of the fund to the survivors is not made out; and the act of the defendant, in executing a mortgage payable as mentioned, is evidence to the contrary. In order more clearly to show that the trust was not as is asserted by the defendant, the complainants have produced the will of H.: and it has been made one of the points, that even admitting the money to have been confided to defendant as stated by him, still the subsequent will of the testatrix must alter and control the disposition of it. I think this correct. The money was still her money; and she might declare the trusts, and fix the distribution as to time. and designate the persons or classes of persons to take. All which she has done by her will.

(353) See Gregory v. Setter, 1 Dall. 193. Thompson's Les. v. White, 1 Dall. 424. Boyd v. M'Lean, 1 Johns. Ch. Rep. 586.

v. Ambrose, and Ryall v. Ryall; and appears to flow from the proposition before stated; for, during the life of the nominal purchaser, no proof can be received of his parol confession, as not being the best existing evidence; and after his death, it is mere parol evidence contradicting the deed, and not of strength to raise a resulting trust.

In the first edition of this work the author submitted it as his opinion, that the proposition, that parol proof could (\*)not be admitted after the death of the nominal purchaser, was not warranted by the authorities referred to in support of it(l), and that the statute is not more broken in upon by admitting parol proof after the death of the nominal purchaser, than it is by allowing such proof in his lifetime(354). And this opinion seems to be confirmed by the case of Lench v. Lench(m). The question there was, whether a purchase by the late husband of the plaintiff of an estate was made with some trust-money of hers, of which he had obtained possession. Parol evidence was admitted of conversations with the husband, in order to prove the fact. Sir Wm. Grant, Master of the Rolls, after premising that there was not only no covenant by the husband to purchase land, but no stipulation in the settlement that land should be purchased, but merely a proviso, that the trustees, with the wife's consent alone, might invest the money in land, said, that as to the ground that the purchase was made with the trust-money, all depended upon the proof of the fact, for whatever doubts might have been formerly entertained on this subject, it is now settled, that

<sup>(1)</sup> Kirk v. Webb, Prec. Cha. 84; Walter de Chirton's case, cited ib.; Newton v. Preston, Prec. Cha. 133; Gascoigne v. Thwing, 1 Vern. 366: Hooper v. Eyles, 2 Vern. 480; Crop v. Norton, 2 Atk. 74.

<sup>(</sup>m) See Lench v. Lench, 10 Ves. jan. 511. The point, I am told, was lately decided the same way in Ireland.

<sup>(354)</sup> See commentary, per KENT, upon the text, in Boyd v. M'Lean, 1 Johns. Ch. Rep. 586. et seq.

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money may in this manner be followed into the land in which it is invested; and a claim of this sort may be supported by parol evidence.—His Honor then examined the weight of the testimony, which he held to be too contradictory and uncertain to be depended upon. So, in Sir John Peachy's case(n), Sir Thomas Clarke, Master of the Rolls, laid it down, that frauds were out of the statute of frauds, for that the Judges had resolved it was absurd that a statute which was made to prevent frauds should be made a handle to support them(355). And therefore, if A. sold an estate to C., and the consideration was expressed to be paid by B., and the conveyance made to B., the Court would allow parol evidence to prove the money paid by C.

Where the evidence is merely parol, although it is clearly admissible, yet it will be received with great caution. Evidence of naked declarations made by the purchaser himself is, as Sir William Grant observed, in all cases, most unsatisfactory evidence, on account of the facility with which it may be fabricated, and the impossibility of contradicting it. Besides, the slightest mistake or failure of recollection may totally alter the effect of the declaration.

So Lord Hardwicke laid it down that parol evidence might be admitted to show the trust, from the mean circumstances of the pretended owner of the real estate or inheritance which makes it impossible for him to be the purchaser(o)(356).

<sup>(</sup>n) Rolls, E. T. 1759, MS.

<sup>(</sup>o) Willis v. Willis, 2 Atk. 71; and see Ryall v. Ryall, 1 Atk. 59; Ambl. 413; and Lench v. Lench, 10 Ves. jun. 511.

<sup>(355)</sup> Smith v. Patton, 1 Serg. & Rawle, 83. See 2 Serg. & Rawle, 527.

<sup>(356)</sup> In Massachusetts, by st. 1783, c. 37, s. 3, all declarations or creations of trusts or confidences of any lands, tenements, or heredita(\*138)

In the late case of Leman v. Whitley, it was held that where an estate is conveyed by the owner to another as

ments are required to be in writing signed by the party, who is by law enabled to grant, assign, or to declare such trust, or by his last will in writing.

It cannot, therefore, be shown by parol evidence that a deed, absolute on the face of it, was made as a security for a debt, upon an agreement to reconvey, &c. Flint v. Sheldon, 13 Mass. 448. And the statute applies to every species of trust, except such as arise by implication of law.

And the court will not allow of the admission of parol evidence for the purpose of showing that the consideration was paid by a person not named in the conveyance, thereby raising a resulting trust. Goodwin v. Hubbard, 15 Mass. 218; Runey v. Edmands, 15 ib. 294.

In the case last cited a portion of an intestate estate was assigned by the probate court, to a married daughter, she paying a sum of money; and her husband paid the sum out of his own money; held, that this created no trust to him in the estate so assigned to his wife, because there was no record or deed from which the trust could be raised. ib.

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In Flint v. Sheldon, supra, Jackson, J. observed- 'The tenant offers parol proof that the conveyance, although absolute on the face of it, was not in truth an absolute conveyance; that the contract or agreement, upon which the deed was made, was not an agreement for the purchase and sale of land, but for the loan and re-payment of a sum of money; and that the deed was made upon the express condition, that it should be void, or that the grantee should reconvey the granted premises, upon the re-payment of the money within a certain time. On stating the point in this manner, no one could doubt that such evidence is inadmissible. An agreement to that effect even if made in writing and signed by the grantee, would not, unless it was under seal, operate as a defeasance of the deed, nor in any manner affect the absolute title, which the grantee had acquired in the land. But such an agreement, if not reduced to writing, would have no effect whatever. The admission of such evidence would violate the fundamental principle recognized by this court in Stackpole v. Arnold, 11 Mass. 27, 'that deeds and specialties cannot be explained, or varied in their signification, by parol evidence, if the terms made use of in the instrument are capable of a sensible explanation of themselves.' The case of Reading v. Weston, 8 Conn. R. 117, is to the same point.

In Bullard r. Briggs, 7 Pick. 533, where one Bates conveyed in mortgage; and a creditor of Bates levied upon his right to redeem and sold the same to the demandant. The tenant claimed under a deed

a purchaser, although he is really only a trustee, the nominal seller cannot by parol evidence alone make out

from Bates whereby the latter conveyed the equity of redemption. Parol evidence was admitted to show that the true consideration was the release of the wife's dower; but the deed to the tenant expressed no trust; and the consideration mentioned in the deed was \$1500. Parker, C. J. in delivering the judgment of the court says—'Several points arise out of this state of the question, which we have considered with much attention. 1st. Is it competent to this tenant to avail herself of the facts proposed to be proved, in order to give validity to the deed to her, on which she relies for her defence?

The consideration proposed to be proved is different from that which is expressed in the deed, and it is objected that the deed is conclusive upon this point; but we think it has been reasonably settled, that this matter is open to evidence. More or less than is expressed in a deed may be proved by parol evidence as the consideration, and even a different consideration, if valuable, may be proved. A deed is valid in law with any valuable consideration, however small; but as inadequateness of consideration may be relied on as evidence of fraud, the party claiming under it may show that another and a greater consideration was given than that which is expressed; and this is done to rebut the presumption of fraud, which might arise from the apparent consideration in the deed. Cases of this sort are of frequent occurrence in the investigation of conveyances alleged to be fraudulent.

And it is not necessary that the consideration should pass immediately from the grantee to the grantor. If A, bargains for land with B, and pays the agreed price, and at A's. request the deed is made to C., without any fraudulent intent, C. may maintain his title to the land by proving the consideration so paid. And if even the design of the conveyance were, that C, should hold the land in trust for A, but he has executed no writing by which that trust can be legally proved, still the title of C. cannot be impeached by a creditor of B. on that account, for a declaration of trust may at any time afterwards be executed, or A. may confide in the integrity of  $C_{\cdot}$ , and it is a matter only between  $A_{\cdot}$  and  $C_{\cdot}$ whether the trust be executed or not. In the case supposed, B. has obtained the value of his land, and his creditors are not necessarily injured. It would be for a jury, on trial, to determine whether the transaction was bona fide, and for sufficient consideration, or a contrivance to cover the property from the creditors of B.; and on this question the value of the land, compared with the amount of the consideration, would be an important ingredient.

It is undoubtedly clear, that a mere voluntary settlement made by a

a trust for himself, but he will have a lien on the estate for the purchase-money (p).

## (p) 4 Russ. 423; Cripps v. Jee, 4 Bro. C. C. 472, sed qu.

husband upon his wife, during the marriage, he being in debt, is void against creditors; but it is equally clear, that a conveyance made in trust for the wife, after marriage, upon the transfer made to him by the wife of an equivalent out of her property, will be established, both in equity and at law; and it ought to be so, for the case supposes, that whatever is taken from the funds of the husband, whereby he might satisfy his creditors, is replaced by an equal amount from the funds of the wife, which his creditors could not otherwise reach. Post-nuptial contracts are sanctioned upon this principle, and the convenience and interest of families frequently require such exchanges. If they are honest, they ought to be supported; if feigned or pretended, they will be uncovered and defeated.

The consideration for this intended settlement on the wife, was her right of dower in the estate which the husband was about to mortgage. Without her relinquishment, he could not raise the money wanted for his support and his debts. Her interest was a valuable interest, which is frequently the subject of contract and bargain; it was an interest which the law recognizes as the subject of conveyance by tine in England, and by deed with us. It may be denominated a contingent interest. Now if we find that the surrender or conveyance by the wife, of a contingent interest in property, is a sufficient consideration for the settlement of property by the husband upon her, then the default should be taken off. The weight of authority is clearly with the affirmative.

The case of Dolin v. Coltman, 1 Vern. 294, in which a conveyance to the wife, of the whole equity of redemption in land which the husband had mortgaged and in which she had relinquished her right of dower, was set aside in favor of two subsequent mortgagees of the husband. They, however, were subsequent purchasers, not creditors, and a distinction exists in favor of purchasers by st. 27 Eliz. which does not hold in favor of creditors under the 13th of the same queen, for there must be fraud in the latter case to avoid the conveyance.

A late writer on marriage settlements, Atherley, (p. 162,) who appears to have thoroughly considered the subject, and has reviewed all the authorities, says, 'This case is but shortly reported, and the reasons for the opinion do not very clearly appear. The reason, most probably, was, that the settlement was more than a reasonable equivalent for the interest the wife had parted with, and if so that case in no wise affects the position that parting with a right of dower will support a settlement

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An express trust, although by parol only, will prevent the resulting  $\operatorname{trust}(q)(357)$ ; because resulting trusts are left by the statute of frauds and perjuries as they were before; and, previously to the act, a bare declaration by parol would prevent any resulting trust. Besides, an equitable (\*)presumption may be rebutted by parol evidence(r)(358); for, as Lord Mansfield has observed, an equitable presumption is only a kind of arbitrary implication raised, to stand until some reasonable proof brought to the contrary.

(q) Lady Bellasis v. Compton, 2 Vern. 294. See Lord Altham v. the Earl of Anglesea, Gilb. Eq. Rep. 16; Roe v. Popham, Dougl. 25.

(r) Langfielde v. Hodges, Lofft, 230; Rider v. Kidder, 10 Ves. jun. 360.

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of marriage.' This writer also supports the position, taken in this opinion, that the consideration need not be expressed in the deed; for he says, if the settlement, on the face of it, appears to be purely voluntary, no notice being taken of the wife having released her jointure, &c.; yet if the fact of her having done so can be shown to have taken place about the same time that the settlement was made, the court will presume the settlement to have been made for that consideration. The case of Ward v. Shallet, 2 Ves. sen. 16, shows that there is no distinction between contingent and vested interests in this respect; and the case of Lavender v. Blackstone, 2 Lev. 146, at law, decided that a jointured wife may, by renouncing her present provision, become a purchaser for a valuable consideration from her husband, of an ample provision for herself. Chancellor Kent, vol. 2. p. 139. 145. in his Commentaries, cites these authorities, and advances the position, that postnuptial contracts founded on the transfer by the wife, of a contingent interest only, are valid against creditors.

We think, then, there is ample authority for adopting the principle, that a relinquishment of dower by the wife, living the husband, is a good and valuable consideration for a conveyance by the husband to the wife, of property which may be considered but a fair equivalent, and that such a conveyance will be valid or otherwise, according as it shall appear on the trial that it was fair or fraudulent, like conveyances by the husband to other persons. The only point of inquiry is, whether the settler has received a fair and reasonable consideration for the thing settled, so as to repel the presumption of fraud.

(357) See M'Guire v. M'Gowen, 4 Des. 491.

(358) See Botsford v. Burr, 2 Johns. Ch. Rep. 416.

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Therefore parol evidence will be admitted to prove the purchaser's intention, that the person to whom the conveyance was made should take beneficially; and if satisfactory, he will be entitled to the estate(s); but the proof rests upon him to show, that the man from whom the consideration moved did not mean to purchase in trust for himself, but intended a gift to the stranger(t).

Where a man merely employs another person by parol, as an agent to buy an estate, who buys it accordingly but denies the trust, and no part of the purchase-money is paid by the principal, and there is no written agreement, he cannot compel the agent to convey the estate to him, as that would be directly in the teeth of the statute of frauds(u)(359).

And although the agent be afterwards convicted of perjury in denying the trust, yet that will not enable the Court to decree a performance in specie(v); and, therefore, as the principal cannot avail himself, in any civil proceeding, of the conviction of the agent, he is a competent witness to prove the perjury(x).

- (s) Taylor v. Alston, cited in Dyer v. Dyer, Watk. Copyh. 216; S. C. MS.; Goodright v. Hodges, ibid. 227; Lofft, 230; 2 East, 534, n.; Maddison v. Andrews, 1 Ves. 57.
  - (t) See 3 Ridg. P. C. 178.
- (u) Bartlett v. Pickersgill, Burr. 2255; 4 East, 577, n. (b). See Rastel v. Hutchinson, 1 Dick. 44.
  - (v) Bartlett v. Pickersgill, ubi sup.
  - (x) The King v. Boston, 4 East, 572. See Fell v. Chamberlain, 2

v. Moore, 7 Cranch, 176. But if a part only of the purchase money be paid by the cestui que trust, the land will be charged with the money advanced, pro tanto. Botsford v. Burr, 2 Johns. Ch. Rep. 410. The payment or advance of money after the purchase is c ompleted, will not raise a resulting trust. Botsford v. Burr, 2 Johns. Rep. 414. Therefore, to raise a trust by implication or operation of law, an actual payment, or loan of money by the cestui que trust, at the time of the purchase, must be shown. Steere v. Steere, 5 Johns. Ch. Rep. 1.

In Crop v. Norton(y), Lord Hardwicke appears to have (\*)been of opinion, that this doctrine of resulting trust only extended to cases where the whole consideration is paid by one person, and the conveyance taken in the name of the other. He said, "this is where the whole consideration moves from such person; but I never knew it where the consideration moved from several persons; for this would introduce all the mischief which the statute of frauds was intended to prevent. Suppose several persons agree to purchase an estate in the name of one, and the purchase-money appears to be paid by him only, I do not know any case where such persons shall come into this Court, and say they paid the purchase-money; but it is expected there should be a declaration of trust."

In the case of Wray v. Steel, the point called for a decision, and Sir Thomas Plumer, Vice-Chancellor, following the true principle, decided in favor of the resulting trust. What, his Honor asked, is there applicable to an advance by a single individual that is not equally applicable to a joint advance under similar circumstances(z)(360)?

II. Before the statute of uses, if a father made a feoffment to a stranger without any consideration, the law raised an use by implication to himself; but if he made a feoffment to his son, no use arose to the father by implication; because the blood, which is a sufficient consideration, fixed and settled the estate in the son. And herein the law of trusts doth (as it ought to do) agree with the law of uses before the statute of H. 8.(a).

Dick. 484, supra, vol. 1, p. 114; and see the King v. Dalby, Peake's Ca. 12, and the cases cited in the note.

- (y) 9 Mod. 233.
- (z) 2 Ves. &. Beam. 388.
- (a) See Rep. t. Finch, 341.

<sup>(360)</sup> See Botsford v. Burr, 2 Johns. Ch. Rep. 410. (\*140)

Therefore, if a father purchase in the name of a child, although illegitimate(b), who is without a provision(c), (\*)or in the joint names of such a child and of another person(d), it will not be deemed a resulting trust for the father but a gift or advancement for the child(e); because a father is under an obligation of duty and conscience to provide for his child in such case. And if the father die without having paid all the purchase-money, his personal estate must pay it for the benefit of his child(f)(361).

Where, by the custom of a manor, copyholds are granted for lives *successive*, it has been holden, that if the father pay the fine, a grant to children, as nominees, shall not be an advancement for them, but a trust for the father (g), and there seems some ground to support this distinction; because the father could not have taken the whole estate in his own name.

But this decision has been over-ruled, and it is now settled, that such a purchase is, upon the general rule, an advancement for the children, and not a trust for the father (h), where the grant is immediate to the children, or even to the father for their lives, if they can, according to the custom of the manor, take at law under such a

- (b) Beckford v. Beckford, Lofft, 490; Fearne's Posthuma, 327; Fonblanque's n. (1) to 2 Trea. Eq. 127, 2d edit.
  - (c) Elliot v. Elliot, 2 Cha. Ca. 231; and see Rep. t. Finch, 341.
  - (d) Lamplugh v. Lamplugh, 1 P. Wms. 112.
- (e) Lady Gorge's case, 3 Cro. 550, cited; Lord Grey v. Lady Grey, 1 Cha. Ca. 296; 2 Swanst. 594; Mumma v. Mumma, 2 Vern. 19; Shales v. Shales, 2 Freem. 252; 1 Eq. Ca. Abr. 382, pl. 9; Anon. 2 Freem. 128, pl. 151; Taylor v. Taylor, 1 Atk. 386.
- (f) Redington v. Redington, 3 Ridgway's P. C. 106. See Redington v. Redington, 9th July 1805, printed case House of Lords.
- (g) Dickenson v. Shaw, cited in Dyer v. Dyer, Watk. Copyh. 216;S. C. MS.
  - (h) Dyer v. Dyer, ubi sup.; and see Swift v. Davis, 8 East, 354, n.

<sup>(361)</sup> See Jackson v. Matsdorf, 11 Johns. Rep. 96. Sampson v. Sampson, 4 Serg. & Rawle, 333.

grant(i): nor is it material that the purchase is of a reversion expectant upon the death of a stranger(j).

A purchase by a papist incapable of purchasing, in the name of a protestant son, was considered a stronger case for an advancement than a purchase by a protestant (\*)parent; because otherwise a constructive trust prohibited by statute would have been raised(k).

It has already been observed, that to make it an advancement, the child must be unadvanced; but an advancement in part is not material (l); and a child having only a reversion expectant upon a life-estate, will be considered as unadvanced (m); and even if the child be advanced, yet if the father consider him unadvanced, that will be sufficient (n).

If the child is already provided for, and the father did not consider him unadvanced (o), or if the father considered the child, from the first, as a trustee for him, he will be held to be so (p); but the proof of this lies on the side of the person wishing to defeat the child's claim; and it seems, that although parol evidence of verbal declaration is admissible in support of the deed, it is inadmissible to create a trust against it (q).

- (i) See Right v. Bawden, 3 East, 260; Smartle v. Penhallow, Lord Raym. 994.
  - (j) Finch v. Finch, 15 Ves. jun. 43.
- (k) Redington v. Redington, 3 Ridg. P. C. 106. See ex parte Houghton, 17 Ves. jun. 251. 10 Geo. 4.
  - (1) See Rep. t. Finch, 326.
  - (m) Lamplugh v. Lamplugh, 1 P. Wms. 111.
  - (n) Redington v. Redington, ubi sup. ..
  - (o) Elliot v. Elliot, 2 Cha. Ca. 231.
- (p) Woodman v. Morrell, 2 Freem. 32; Swift v. Davis, 8 East, 354, n. See Murless v. Franklin, 1 Swanst. 13.
- (q) Shales v. Shales, 2 Freem. 252; Lamplugh v. Lamplugh, 1 P.
  Wms. 111; Taylor v. Taylor, 1 Atk. 386; Redington v. Redington,
  3 Ridg. P. C. 106; Finch v. Finch, 15 Ves. jun. 43.

(\*142)

In Swift v. Davis(r), where a father was the sole purchaser of an estate for three lives, who would take successive, and put in the lives of himself and his two sons; and at the same court obtained a license from the lord to himself and his mother (who had her widowhood-right in the copyhold) to lease for seventy years, Lord Kenyon laid it down, that in such a case, if the father afterwards grant a lease by way of mortgage pursuant to such license to lease, and there be a custom in the manor for the first taker to (\*) dispose of the estate as against the other lives, such custom may so far operate as to divest the legal estate of the lives in reversion, and give it to the lessee. Or, if there were any doubt of that, or if the license of the lord might be construed to extend only to the first taker of the new copy jointly with his mother, and the first taker alone executed such license after her death, yet a court of equity (even if the surviving life (the son) succeeded at law on his strict legal title) would make the son, the surviving life, convey to his father's lessee, and pay all the costs in law and equity.

So a surrender by the father to the use of his will immediately after the grant makes the son a trustee for the father(s).

Possession by the father, during the infancy of his child(t), will not be deemed subversive of the child's claim; for it cannot be supposed the parent would have named a youth as a trustee; and therefore his taking the profits must be intended to have been done by him as guardian to the son. In an early case(u), indeed, the

<sup>(</sup>r) 8 East, 354, n.

<sup>(</sup>s) Prankerd v. Prankerd, 1 Sim. & Stu. 1.

<sup>(</sup>t) See Finch, 340, 341; Lamplugh v. Lamplugh, 1 P. Wms. 112; Mumma v. Mumma, 2 Vern. 19; Redington v. Redington, 3 Ridg. P. C. 106. Note, the case of the Attorney-general v. Bagg, Hard. 135, turned on fraud.

<sup>(</sup>u) Sir George Binion v. Stone, Nels. Cha. Rep. 68; 2 Freem. 169. See King v. Denison, 1 Ves. & Bea. 260.

tender years of the child was considered as evidence that the father did not purchase for his benefit, because he was too young to need an advancement.

A distinction has been drawn where the parent has taken the profit after the child's coming of age, and when of discretion to claim his  $\operatorname{right}(v)$ ; in which case, it is said, the child shall be a trustee for the father. But this cannot be depended on. It seldom happens that the (\*)father gives the son possession during his life; and yet, as the Court observed in the case of Lord Grey v. Lady  $\operatorname{Grey}(x)$ , in all cases whatsoever, where a trust shall be between the father and son, contrary to the consideration and operation of law, the same ought to appear upon very plain and coherent and binding evidence, and not by any argument or inference from the father's continuing in possession, and receiving the profits, which sometimes the son may not in good manners contradict, especially where he is advanced but in part.

So the circumstance of the parent laying out money in repairs and improvements will not make the child a trustee(y).

A declaration of trust by the father, subsequently to the conveyance, will not divest the gift to the child(z); and therefore a devise by him of the estate will be inoperative(a).

It is, however, quite clear, that according to the general rule of equity, if the father devise to another the estate

<sup>(</sup>v) Lloyd v. Read, 1 P. Wms. 608; and see Gilb. Lex Prætoria, 271.

<sup>(</sup>x) Rep. t. Finch, 340.

<sup>(</sup>y) Shales v. Shales, 2 Freem. 252; Mumma v. Mumma, 2 Vern.

 <sup>(</sup>z) Woodman v. Morrell, 2 Freem. 32; Elliot v. Elliot, 2 Cha. Ca.
 231. See Redington v. Redington, 3 Ridgw. P. C. 106.

<sup>(</sup>a) Mumma v. Mumma, 2 Vern. 19; Dyer v. Dyer, Watk. Copyh. 216; S. C. MS.

<sup>(\*144)</sup> 

bought in the name of the child, and make other provision for the child by his will, he would at this day be put to his election; although in the early case of Shales v. Shales (b), where these circumstances occurred, the child was not put to his election.

If the conveyance of the fee to a son is proved to be for a particular purpose, as to sever a joint-tenancy, the child will be a trustee for the father (c).

A purchase by a father, in the joint names of *himself* (\*) and son, will be considered as an advancement for the child, if he is unprovided for; and consequently equity will not assist to defeat his legal claim(d).

But a purchase in the names of father and son, as jointtenants, has not been considered so strong a case for an advancement as it formerly was; it is said, that it does not answer the purpose of an advancement, for it entitles the father to the possession of the whole till a division, and to a moiety absolutely even after a division, besides the father's taking a chance to himself of being a survivor of the other moiety: nay, if the son dies during his minority, the father would be entitled to the whole by virtue of the survivorship, and the son could not have prevented it by severance, he being an infant(e). And accordingly, in a case(f) where a father purchased an estate in the names of himself and son, and had no other estate to which a judgment-creditor could resort, the creditor was relieved in equity against the survivorship at law; the settlement being considered as voluntary and fraudulent against creditors(g).

<sup>(</sup>b) 2 Freem. 252.

<sup>(</sup>c) Baylis v. Newton, 2 Vern. 28; and see Birch v. Blagrave, Ambl. 264; Sir Walter Raleigh's case, Hard. 497, cited.

<sup>(</sup>d) Scroope v. Scroope, 1 Cha. Ca. 27:

<sup>(</sup>e) Per Lord Hardwicke, 2 Atk. 480; and see Pole v. Pole, 1 Ves. 76.

<sup>(</sup>f) Stileman v. Ashdown, 2 Atk. 477.

<sup>(</sup>g) See 13 Eliz. c. 5.

But there does not appear to be much weight in the reasons above stated. It is evident that a moiety of some estates may be a much better provision than the entirety of others. The chance of survivorship which the father takes is an incident to the tenancy, and extends equally to the son, who, after he attains his majority, may sever the jointtenancy. If he die during his minority, it is as well that the estate should survive to the father, who paid the purchase-money, and perhaps took the conveyance to himself and son as joint tenants, with the express view of advancing him only in the event of his attaining that age (\*)at which the law considers a man capable of managing his fortune. During the son's minority and the life of his father, upon whom should he be dependent if not upon his own parent? If the father die during the son's minority, the estate will survive to him; so that, perhaps, it is impossible to contend with success, that a purchase by a parent in the name of himself and child, as joint tenants, is not as strong a case for an advancement as a purchase in the name of the child solely. Fraud is of course an exception to every rule.

A purchase in the name of a child solely, or jointly with the parent's name, is not, however, within the 27 Eliz.(h). And therefore a subsequent purchaser, although bonu fide, will not be relieved against it(i).

But such a purchase fell expressly within the letter of the 21st of James 1.(j) if the father was a trader at the time; and his being solvent would not protect the purchase (k). But if the purchase was made before the father engaged in trade, and without any fraudulent purpose of becoming a bankrupt, it would have been good,

<sup>(</sup>h) C. 4.

<sup>(</sup>i) Lady Gorge's case, 3 Cro. 550, cited.

<sup>(</sup>j) C. 15, s. 5. See Walker v. Burrows, 1 Atk. 93.

<sup>(</sup>k) Fryer v. Flood, 1 Bro. C. C. 160; Glaister v. Hewer, 8 Ves. jun. 195.
(\*146)

although the father afterwards commenced tradesman, and was made a bankrupt(l).

The law was partially altered by the 6 Geo. 4, c. 16, s. 73, which only gives to the creditors the benefit of the purchase, where the bankrupt is at the time insolvent. It deserves serious consideration whether the law should not be restored.

If the father be dead, a purchase by the grandfather, in the name of his grandchild, is subject to the same rules as govern a purchase by a father in the name of his child; (\*) for on the death of the father, the grandchild, is under the protection of the grandfather(m); but in Lloyd v. Read(n) this distinction does not seem to have been attended to. The case, however, depended upon its own peculiar circumstances.

So a purchase by a husband in the name of his wife is also deemed an advancement and provision for her(o). But if a purchase in the name of wife or child be after marriage, and voluntary, it may perhaps be fraudulent as against creditors (p), in like manner as if the settlement was of property actually vested in the husband, in even which case it seems that the husband must be proved to have been indebted at the time of the settlement to the extent of insolvency, in order to affect the settlement (q). It has, however, been strenuously argued, that a purchase is not within the operation of the statute of 13 Eliz.; for, as the purchase may give the money to the object of his bounty to purchase the estate for himself, he may by the same reason direct a conveyance to be made to him; and

<sup>(1)</sup> Crisp v. Pratt, Cro. Car. 548; Lilly v. Osborn, 3 P. Wms. 298; and see 8 Ves. jun. 200, 204.

<sup>(4</sup>n) Ebrand v. Dancer, 2 Cha. Ca. 26.

<sup>(</sup>n) 1 P. Wms. 608.

<sup>(</sup>o) Kingdome v. Bridges, Back v. Andrews, 2 Vern. 67, 120.

<sup>(</sup>p) Christ's Hospital v. Budgin, 2 Vern. 683.

<sup>(</sup>q) See Lush v. Wilkinson, 5 Ves. jun. 384.

this seems to be the better opinion, where the case is clear of actual fraud(r).

A purchase by a trader in the name of his wife seems subject to the same rules as a purchase by a trader in the name of his child(s). But a purchase by a trader of the land-tax on his wife's estate, for her benefit(t), or of an enfranchisement of his wife's copyhold estate, or money laid out by him in building on her estate, being mere (\*)voluntary expenditure, cannot be made a ground of charge against her or her estate by his creditors, although he was insolvent at the time(u).

On this subject it remains only to remark, that Lord Chief Baron Gilbert observes(x), that a difference is taken between a purchase in the name of a son and of a daughter; for though sons are often provided for by settlement of lands, yet daughters seldom are, therefore the presumption is not so strong. The learned author does not, however, refer to any case in support of his position; and in Lady Gorge's case she appears to have enjoyed an estate purchased by her father, the Earl of Lincoln, in her name(y). Indeed, admitting the general rule, as to providing for daughters by settlement of lands, where there is a son; yet, in the case under consideration, the purchase itself is strong evidence of the intent, more especially as a woman is an unfit trustee of a real estate.

<sup>(</sup>r) See Fletcher v. Sidley, 2 Vern. 490; Proctor v. Warren, Sel. Cha. Ca. 78; and 8 Ves. jun. 199.

<sup>(</sup>s) See Glaister v. Hewer, 8 Ves. jun. 195; 9 Ves. jun. 12; 11 Ves. jun. 377.

<sup>(</sup>t) Burrough's case, 17 Ves. jun. 267, cited.

<sup>(</sup>u) Campion v. Cotton, 17 Ves. jun. 263.

<sup>(</sup>x) Lex Prætoria, 272.

<sup>(</sup>y) Lady Gorge's case, 3 Cro. 550, cited. (\*148)

#### SECTION III.

## Of Purchases with Trust Money.

If a trustee, or executor, purchase estates with his trust-money or assets, and take the conveyance in his own name, without the trust appearing on the face of the deeds, the estates will not be liable to the trusts, although he die insolvent, unless the application of the purchase-money can be clearly proved. And the same principle applies to a purchase by a husband with trust-money belonging to his wife, of which he may have obtained possession from the trustee, whether with or without the wife's (\*)consent(362); or to a purchase by an agent or steward with monies remitted to him by his principal(z).

### (z) Bennet v. Mayhew, 1 Bro. C. C. 232; 2 Bro. C. C. 287, cited.

(362) See Methodist Epis. Church v. Jaques, 1 Johns. Ch. Rep. 450. Where the executor, or a trustee, becomes the purchaser, he takes it clothed with the same trusts as it was liable to in his hands previous to the sale. Thus, in Bruch v. Lantz, 2 Rawle's R. 392, where in a sale made by the executors of the will, one of the executors, became a joint purchaser, and afterwards became the sole owner of the estate; held, that the sale was voidable: for the power in the will constituted the executors trustees for the devisees and heirs; the general law, with the devise, trustees for the benefit of the creditors. Where, then, the executor becomes the purchaser, he takes it clothed with the same trusts as it was liable to in his hands previous to the sale; and though ratified by the devisees and heirs, the creditors may nevertheless take the land to satisfy their executions. Rogers, J. observed, that "this did not contravene the principle of Grant v. Hook, 13 S. & R., 359, that where the testator authorized his executors to sell as much of his real estate as should be necessary to pay his debts and educate his minor children, the executors had power to sell the real estate of the testator free from

In the old cases(a) the courts of equity were much more strict in the proof they admitted of the application of the

(a) Kirk v. Webb, Prec. Cha. 84; Heron v. Heron, Prec. Cha.
163; Halcot v. Markant, Prec. Cha. 168; Kendar v. Milward, 2 Vern.
440; Prec. Cha. 171. See Cox v. Bateman, 2 Ves. 19.

the incumbrance of his debts, and the purchaser was not bound to see to the application of the purchase money. And this is doubtless the law, taken with the qualification, that the purchaser is not buyer and seller; for the purchaser, who is a stranger, is not answerable for the misconduct of the executor, arising from a misapplication of the purchase money. The law regards the executor as a fraudulent trustee, as having acted in contravention of public policy.

It seems immaterial whether the executor or administrator uses his own money; for it is the relation, the office and trust which alone are regarded. Dawes, Judge, &c. v. Boylston, Oct. T. 1812, 9 Mass. 337.

Debt on bond, to plaintiff, as judge of Probate, by defendant as administrator de bonis non with a copy of the will of Thomas Boylston, late of London, be annexed pursuant to statute of 1785, c. 12.

The action was prosecuted for the benefit of the inhabitants of Boston, named as residuary legatees in said will.

Sewall, J.—The general question is, whether the judgment recovered by the defendant, as administrator against one G. in this state, so far as satisfaction has been had, is to be inventoried and accounted for by defendant, according to the condition of this bond.—The defendant relies upon an assignment to himself of the judgment by the assignees of said Thomas B., &c. bankrupts.

The following points were decided. 1. That the assignees of a bankrupt in England, cannot recover, in our courts, a debt due to the bankrupt, in their own names. 2. The assignment of a chose in action is not defeated by the death of the assignor; but the assignor may use the name of the executor or administrator; and where the assignee himself becomes afterwards the administrator, he may recover the same, as administrator, to his own use.

3. If the assignees of a bankrupt deceased, assign the property of the deceased, to his administrator cum testamento annexo, for his own use and benefit, he is nevertheless accountable to the creditors and others entitled under the will. Sewall, J. in delivering the opinion of the Court, said—Upon the whole, if it was competent for defendant to purchase the property in question to his use, there is sufficient evidence of the in-

money than they now are; but it was always very clear, that upon sufficient proof of the trust-money having been

tention of the assignees to sell, and of the defendant to purchase to his own use; and their contract must avail accordingly.

But the demands assigned were not recoverable at the time of the assignment, but, by the intervention of an administrator in this jurisdiction, where the debts were due, and the debtor was then living ;-nor could the assignces themselves have recovered the demands to the exclusion of the creditors of the deceased bankrupt here. (Doug. 170). The trusts and purposes, for which these demands had been vested in the assignees were then nearly fulfilled; and the sufficiency of the effects to respond the claims were then capable of being ascertained; and for the surplus property they were in effect the trustees of the deceased, and of his representatives afterwards. The defendant as administrator had authority to enforce the execution of their trust; and it had become his duty to exercise this authority for the use and benefit of the creditors and legatees of the deceased testator. Indeed the rights of the deceased resulting upon the limitations upon the property in the hands of the assignees, and from their covenants to reconvey when the trusts in favor of the creditors had been fulfilled, were in the nature of choses in action, which had vested in the defendant as administrator. His acceptance of the assignment, operated as a discharge of the assignees. But it is said that a remedy in a case of trust can be enforced only in Chancery. It should be recollected that executors and administrators are trustees, and amenable as such in courts of law, as well as in Chancery. The rules and principles respecting the office and duty of executors and administrators are, with a few alterations, the same here as in England. The personal estate of a testator or intestate vests in his executor or administrator, including his bonds, contracts, promises, and other choses in action, as well as his goods and chattels. If they release a debt or contract, by which his testator or intestate was entitled to a sum of money or other advantage, the release is in his own wrong, and he is chargeable for the amount or value. If he compounds debts or mortgages, and buy them in for less than is due upon them, the executor or administrator is not to have the advantage to himself; but it belongs to the creditors or legatees, or party entitled to the surplus. if he redeems a pledge of the testator, it shall be assets in his hands to pay debts and legacies.

The principle in the authorities for these positions is, that executors, &c., are trustees, who are incompetent, without the approval of the jurisdiction to which they are accountable, to make to themselves any part of the property in trust.

laid out in the purchase of the estate, a trust would result and be decreed accordingly (b)(363). Parol evidence is, in these cases, admissible either in the life-time, or after the decease of the trustee: but unless there are corroborating circumstances, as a writing under the trustee's hand, stating the application of the money, or the inability of the trustee to make the purchase with other funds (c), mere parol evidence of declarations supposed to be made by the purchaser will be received with great caution (364).

- (b) Anon. Sel. Cha. Ca. 57; Lane v. Dighton, Ambl. 409; Balgney v. Hamilton, cited *ibid.*; Ryall v. Ryall, 1 Atk. 59; Ambl. 413; and see Earl of Plymouth v. Hickman, 2 Vern. 167.
- (c) See Lench v. Lench, 10 Ves. jun. 511; Wilson v. Foreman, 2 Dick. 593, as corrected by the Master of the Rolls, 10 Ves. jun. 519; and see Anon. Sel. Cha. Ca. 57.

It is immaterial whether the executor or administrator used in the purchase his own money: it is the relation, the office and trust, which alone are to be regarded. The transaction if confirmed, would be in itself a devastavit. To sanction the claim of the defendant, would be to sanction a breach of trust.

The law has wisely forbidden trustees from acting in the double capacity of buyers and sellers. But their acts are not void; but voidable by the cestui que trust. Thus, in Den v. Knight, 6 Hals. R. 385, 2 ib. 175, where a deed of conveyance was made by executors, who were authorized to make sale of the real estate; and they sold to a third person; but with the intent that the purchaser should reconvey to them; the Court considered the conveyance voidable; but strangers, and parties to the deed or those claiming under them, cannot make the objec-To the same effect is the case of Banks v. Judah, 8 Conn. 145, which related to the sale of the capital stock of a manufacturing corporation: A majority in interest agreed to sell; and by their agent sold, and through an agent the same proprietors purchased; and with the proceeds formed a new company: held, that the sale might be avoided by such of the parties in interest as were not concerned in the transaction. Relief, however was not granted in that case on account of the length of time which had elapsed.

(363) See Methodist Epis. Church v. Jaques, 1 Johns. Ch. Rep. 457. See also Wallace v. Duffield, 2 Serg. & Rawle, 529.

(364) See Botsford v. Burr, 2 Johns. Ch. Rep. 412. and see 2 Serg. & Rawle, 527.

Where a trustee or agent is bound by the trust to lay out the money in land, if he lay it out accordingly, it will be presumed to have been done in execution of the trust(d):

But if a trustee has considered himself entitled to the trust-money for his own benefit, no presumption can be raised in opposition to this fact, that he intended any lands he may have bought with the trust-money to be subject to the trust(e).

(\*)Here we may introduce a case, where a man, on his marriage, contracted to assure all such personal estate as he should, during the joint lives of him and his wife, be possessed of, upon certain trusts. He purchased a real estate, for which he paid partly out of his own monies, and partly out of monies borrowed on his personal security. It was insisted, that the real estate was bound by the trusts: but Lord Eldon determined, that it belonged to the heir, but charged for the benefit of the persons claiming under the trust, with the purchase-money paid by the husband out of his own funds and lasting improvements on the estate; and also with the money borrowed, which he in his life-time paid off out of his personal estate, and the estate was held the primary fund for payment of the money borrowed. In this case it will be seen that the application of the settled fund was clearly traced, for all the husband's personal estate was bound by the settlement; and the only question was, whether the cestui que trust should have the estate, or the trust-fund laid out in the purchase of it(f).

<sup>(</sup>d) See the cases in Sect. 4, infra.

<sup>(</sup>e) Perry v. Phelips, 4 Ves. jun. 108; 17 Ves. jun. 173; and see Cox v. Paxton, 17 Ves. jun. 329; Savage v. Carroll, 1 Ball & Beatty, 265; supra, Vol. 1, p. 180.

<sup>(</sup>f) Lewis v. Madocks, 8 Ves. jun. 150; 17 Ves. jun. 48. See Denton v. Davies, 18 Ves. 499.

#### SECTION IV.

Of the performance of a Covenant to purchase and settle an estate.

Where a man covenants to purchase and settle, or, having no real estate, to convey and settle lands, and afterwards accordingly purchases lands of equal or greater value, but neglects to settle them, yet they shall be held to have been purchased with an intent to perform the (\*)covenant, and shall accordingly go in performance of it(g), and the heir must give up the estate, although he is not the person entitled to the benefit of the covenant(h).

It is even a general rule in equity, that where a man covenants to do an act, and he does that which may protanto be converted to a completion of the covenant, he shall be presumed to have done it with such intention(i). Therefore, where the covenantor has purchased lands, but not of sufficient amount to wholly perform the covenant, yet they shall go in performance of it as far as they will extend(k). It may not be possible to lay out all the money in one purchase; but that is not a sufficient reason why the estates actually purchased should descend to the heir at law for his own benefit, to the entire ruin, perhaps, of the rest of the family.

<sup>(</sup>g) Wilcocks v. Wilcocks, 2 Vern. 558; Deacon v. Smith, 3 Atk. 323.

<sup>(</sup>h) Garthshore v. Chalie, 10 Ves. jun. 9.

<sup>(</sup>i) See Sowden v. Sowden, Cox's n. 3 P. Wms. 228.

<sup>(</sup>k) Lechmere v. Earl of Carlisle, 3 P. Wms. 211; For. 80; MS. App. No. 24, a fuller note of this part of Lord Talbot's judgment; Whorwood v. Whorwood, 1 Ves. 540; Sowden v. Sowden, 3 P. Wms. 228, n.; 1 Bro. C. C. 582. See 4 Ves. jun. 116, 117; 10 Ves. jun. 9. 516; Gardner v. Lord Townsend, Coop. 301.

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The like principle has been extended to a case where the covenantor was to pay the money to trustees, to be by them laid out in the purchase of estates(l).

It is not material in these cases, that the purchase was to be made with the consent of persons whose consent was never even applied for(m), or within a limited time, and the purchase was not made till after the expiration of the time appointed(n). Nor is it important that there was a subsisting mortgage on the estate, upon which the covenantor took up money from another person in order to enable him to complete the purchase(o). And it will (\*)not vary the case, that the covenantor had an option to settle a rentcharge instead of the lands themselves, unless he have shown an intention to avail himself of his right to elect(p).

But where a clear intent appears to *lay out* the entire sum in the *future* purchase of lands, estates of which the covenantor was seised at the time of the covenant, and which he permitted to descend, cannot go in performance of the agreement, because such clearly could not have been his intention(q).

And, to enure as a performance, the property purchased must be such as will answer the intent of the settlement(r). Therefore, under a covenant to purchase feesimple lands in possession, estates in reversion, expectant upon lives will not go in performance(s), unless, perhaps,

<sup>(1)</sup> Sowden v. Sowden, 1 Bro. C. C. 582.

<sup>(</sup>m) Lechmere v. Earl of Carlisle, ubi sup.

<sup>(</sup>n) S. C.; and see 3 Atk. 329.

<sup>(</sup>o) Deacon v. Smith, 3 Atk. 323.

<sup>(</sup>p) Deacon v. Smith, 3 Atk. 323.

<sup>(</sup>q) Lechmere v. Earl of Carlisle, For. 80, et ubi sup. See Davys v. Howard, 5 Bro. P. C. 552.

<sup>(</sup>r) See Lewes v. Hill, 1 Ves. 274.

<sup>(</sup>s) Lechmere v. Earl of Carlisle, 3 P. Wms. 211; Deacon v. Smith, 3 Atk. 323; Whorwood v. Whorwood, 1 Ves. 540.

they fall into possession in the covenantor's life-time; neither will leaseholds for lives, nor terms of years, even with covenants to purchase the fee, go in performance, as they cannot descend to the heir(t).

So a moiety of a house would not be considered a kind of property within a covenant to purchase lands of inheritance: nor would lands, having a different descent, as borough English lands, which descend to the youngest son, instead of lands descendible to the eldest son, according to the course of the common law(u). Neither will copyhold estates go in part performance of a covenant to purchase freehold lands, where the nature of the tenure would prevent compliance with the terms of the settlement, as where the estate is to be settled on one for life without impeachment (\*) of waste(x). But where this circumstance does not occur, copyhold estates may, it should seem, go in part performance of a covenant to purchase real estates(y), although Lord Hardwicke seems to have doubted whether copyhold lands could go in performance, as they are liable to different tenures and to forfeiture (z).

Where the purchase was made bona fide with an intent to perform the covenant, the lands must, it is conceived, in most cases be taken at the price paid for them (u), or at least at their value at that time. This construction, however, is not made to the prejudice of purchasers, for if the covenantor sell the estates, it will be evidence of his intention that they should not be bound by the settlement, and therefore they could not be followed in the hands of

- (t) Lechmere v. Earl of Carlisle, ubi sup.
- (u) Pennill v. Hallett, Ambl. 106.
- (x) Pennill v. Hallett, Ambl. 106.
- (y) Wilks v. Wilks, 5 Vin. Abr. 293, fol. 39. Note, the covenant was generally to purchase lands.
  - (z) Whorwood v. Whorwood, 1 Ves. 540.
- (a) Lechmere v. Earl of Carlisle, For. 80. See and consider Pennill v. Hallett, Ambl. 106.

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the purchaser(b). But it is no objection in these cases that the arrangement will affect specialty creditors, for it is in the power of the owner of the estate to prefer one specialty creditor to another, because none of them have any specific lien on the lands(c).

It may be considered as a general rule, although it may not hold universally true, that a covenant to convey and settle lands, will not be a specific lien on the lands of the covenantor, but the covenantee will be a creditor by specialty. In one case, where a man gave a bond, before marriage, to convey sufficient freehold or copyhold estates, to raise 600l. per annum, for his intended wife, in bar of dower, she was decreed to be a creditor, by specialty of her husband, and to be entitled to be paid the arrears of her annuity out of his personal estate, in a course of administration; and if the same should not be sufficient, (\*)then out of the real estates of which he died seised in fee-simple, and if those should not be sufficient, then out of the real estates in settlement of which he was tenant in tail, provided such deficiencies did not exceed the amount of the dower which she would have been entitled to thereout, in case she had not accepted the annuity for her life, as aforesaid(d). Lord Thurlow, in a subsequent stage of the cause, said, that the Court had charged the real, in aid of the personal, by a very subtle equity, because, if she had not made a contract of forbearance of dower, the entailed estate would have been liable to her dower(366).

<sup>(</sup>b) Smith v. Deacon, 3 Atk. 323.

<sup>(</sup>c) S. C.

<sup>(</sup>d) Forster v. Forster, 3d Feb. 1787, MS. See 3 Bro. C. C. 490. Consider now the operation of the 3 & 4 Will. 4, c. 105.

<sup>(366)</sup> The husband, by an ante-nuptial agreement, in consideration of his intended wife's fortune, covenanted to charge his whole estate with a certain sum, as a settlement on her and the children of the marriage;

—He received her fortune, and died insolvent;—Afterwards, an additional part of her fortune, unexpectedly, came into the hands of his executors;—In such case, as the husband would have been entitled to the monies in the hands of the executors, had he been alive, a court of equity will protect the rights of the wife acquired by virtue of the agreement, against the claims of creditors; and direct, that the funds thus in the hands of the executors, be first applied to make up the sum charged on the husband's estate, for the benefit of the wife. Carnes v. Smith, 2 Des. 299.

# (\*)CHAPTER XVI.

OF THE PROTECTION AND RELIEF AFFORDED TO PUR-CHASERS BY STATUTES, AND BY THE RULES OF EQUITY.

In the former chapters an attempt has been made to trace the purchase from its inception by contract, to its completion by conveyance; the subjects which may be said to arise out of the conveyance have been treated of; and it has been considered who are incapable of purchasing Let us now suppose the purchase to be completed, and proceed to inquire to what protection and relief purchasers are entitled. The protection and relief afforded to purchasers appear to arise either from positive statutes, or from the rules of equity. The common law hath, indeed, done all which, from its peculiar nature, it can do in support of the claims of bona fide purchasers; for we are told, that the maxims of the common law. which refer to descents, discontinuances, non-claims, and to collateral warranties, are only the wise arts and intentions of the law to protect the possession, and strengthen the rights of purchasers(a). Lord Mansfield indeed held, that in every case between purchasers for valuable consideration, a court of equity must follow, and not lead the law. And the rules of equity were, in his time, pretty generally adopted in the courts of law(b). It could not long escape

<sup>(</sup>a) Finch, 104. See Bac. on Uses, 36. They are now mostly altered by the late statutes.

<sup>(</sup>b) Keech v. Hall, Dougl. 22; Weakley v. Bucknell, Cowp. 473. This practice did not escape the inquiring eye of Junius; see vol. 2. 41, 384.

observation, that from the peculiar constitution of this (\*)country, the rules of law and equity ought ever to continue distinct; and accordingly all the great Judges who have succeeded Lord Mansfield have determined that the legal estate must prevail at law(c). We need, therefore, only consider, first, the statutes which have been passed for the protection or relief of purchasers: and, secondly, the rules of equity in favor of purchasers.

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#### SECTION I.

Of fraudulent and voluntary Settlements, and Settlements with Powers of Revocation.

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I. First then. By 27 Eliz. c. 4.(d) it is enacted, that all conveyances, grants, &c. out of any lands, tenements, or other hereditaments, to be had or made for the intent and of purpose to defraud and deceive such persons as shall purchase the same lands, tenements, or other hereditaments, so formerly conveyed, granted, &c. or any rent, profit or commodity, in or out of the same, shall be deemed and taken only as against such persons and their representatives as should so purchase for money or other good consideration, the same lands, tenements, or other hereditaments, or any rents, profits, or commodity in or out of the same, to be utterly void.

But it is provided, that the act shall not extend to make

<sup>(</sup>c) See 5 East, 138; 6 Ves. jun. 174; 3 Bos. & Pull. 162; and 1 Scho. & Lef. 66; Doe v. Morris, 1 Taunt. 52.

<sup>(</sup>d) Made perpetual by 30 Eliz. 18, s. 3. (\*156)

void any conveyance, &c. to be made for good consideration, and bona fine, to any person.

And it is also enacted, that if any person shall make any conveyance, &c. of any lands, tenements or hereditaments, with any clause of revocation or alteration at his (\*)pleasure of such conveyance, &c. and shall afterwards sell the same to any person or persons for money or other good consideration paid or given (the said first conveyance, &c. not being revoked according to the power reserved by the said secret conveyance, &c.), then the said first conveyance, &c., as touching the lands, tenements, and hereditaments so after sold, against the vendees, &c. shall be deemed and be void, and of none effect; provided that no bona fide mortgage should be affected by the Act.

To take advantage of this statute, a person must have purchased bona fide and for a valuable consideration (367), but the Court will not enter into the adequacy of the consideration, unless it was so small as to be palpably fraudulent (e) (368). Whatever consideration would be sufficient to support an original settlement will be sufficient to avoid a prior voluntary one. The subject of the sale must, however, be an existing lawful interest. Thus in a case

(e) Upton v. Bassett, Cro. Eliz. 444; Doe v. Routledge, Cowp. 705; Needham v. Beaumont, 3 Rep. 83, b; 2 And. 233; Doe v. Routledge, Cowp. 705. See Bullock v. Sadlier, Ambl. 764; Hill v. Bishop of Exeter, 2 Taunt. 69; Doe v. James, 16 East, 212. See 1 Ves. & Beam. 184; Treatise of Powers, 4th edit. p. 418.

<sup>(367)</sup> See Jackson v. Henry, 10 Johns. Rep. 185, 197. Anderson v. Roberts, on appeal, 18 Johns. Rep. 515. Contra, S. C. 3 Johns. Ch. Rep. 371. Preston v. Crofut, 1 Conn. Rep. 527, in note. Sterry v. Arden, 1 Johns. Ch. Rep. 261, 267; and see Anon. 2 Des. 304. Taylor v. Heriot, 4 Des. 227, 232. See also, Jackson v. Ham, 15 Johns. Rep. 263. Sexton v. Wheaton, 8 Wheat. 229.

<sup>(368)</sup> See Hildreth v. Sands, 2 Johns. Ch. Rep. 35. S. C. on appeal, 14 Johns. Rep. 493. Boyd v. Dunlap, 1 Johns. Ch. Rep. 478. Sterry v. Arden, 1 Johns. Ch. Rep. 267. S. C. on appeal, 12 Johns. Rep. 536.

mentioned by Sir Edward Coke, in his commentary on Littleton(f), A. had a lease of certain lands for sixty years, if he lived so long, and forged a lease for ninety years absolutely, and he by indenture reciting the forged lease, for valuable consideration, bargained and sold the forged lease, and all his interest in the land to B. Sir Edward Coke adds, that it seemed to him that B was no purchaser within the statute of 27 Eliz., for he contracted not for the true and lawful interest, for that was not known to him; for then perhaps he would not have dealt for it, and the visible and known term was forged; and although by general words the true interest passed, notwithstanding he gave no valuable consideration, nor contracted for (\*)it. And of this opinion were all the Judges in Sergeant's Inn. It is, however, a very narrow construction.

In the construction of this Act it hath been holden, that although the fraudulent conveyance is not made by the vendor himself, yet it is void against a purchaser. Therefore, if a father make a fraudulent lease, and then die, and the person claiming under him sell the estate, the purchaser shall avoid the lease, whether the vendor did or did not know of its existence(g).

And the statute being general, and made to suppress fraud, extends to fraudulent conveyances to the King. Therefore, in the case of Magdalen College(h), it was resolved by Lord C. J. Coke, that if tenant in tail be seised of land, the remainder over in tail or in fee, and he in remainder knowing the tenant in tail will alien the land, and by recovery bar his remainder, to the intent to deprive the tenant in tail of his birthright, and the power which the law gives him to bar the remainder, and on purpose and with intent to deceive the purchaser, grants his remainder

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<sup>(</sup>f) Co. Litt. 3, b. See Hatton v. Jones, Bull. N. P. 90.

<sup>(</sup>g) Burrell's case, 6 Rep. 72; Jones v. Groobham, Co. Litt. 3 b.; Warburton v. Loveland, 1 Dow. & Clark, 497.

<sup>(</sup>h) 11 Rep. 66.

to the Queen by deed enrolled, and afterwards tenant in tail, for a valuable consideration, aliens the land by a common recovery, and dies without issue, the purchaser shall enjoy the lease against the Queen, by the statute of Elizabeth. And of such opinion was Popham, C. J. openly in the Exchequer Chamber. This is a very important resolution, and shows in the strongest view, how liberal a construction this statute hath received, for the Queen was not a party to the fraud, and by her prerogative at common law the reversion in her could not be affected by a common recovery(i).

(\*)It hath been determined(k), that notice to a purchaser of a fraudulent conveyance is of no consequence, for the statute makes it absolutely void(369).

A conveyance for payment of debts generally, to which no creditor is a party, nor any particular debts expressed, is a fraudulent conveyance within this statute, against a subsequent purchaser for valuable consideration (l).

But if the conveyance were made with an honest intent, and the purchaser had notice of the trust, it seems that he will not be relieved against it(m). And upon the whole, as Mr. Roberts justly remarks(n), these are cases of such danger to purchasers, that a prudent adviser can hardly recommend a title which has been at all the subject of arrangements for the payment of debts remaining unsatisfied (370).

<sup>(</sup>i) See Wiseman's case, and Chomley's case, 2 Rep. 15. 50; and see 2 Ro. Abr. 393, T. Recoverie Common; see 3 & 4 Will. 4, c. 74.

<sup>(</sup>k) Gooch's case, 5 Co. 60, a.

<sup>(</sup>l) Leech v. Leech, 1 Cha. Ca. 249. See Wallwyn v. Coutts, 3 Mer. 707.

<sup>(</sup>m) Langton v. Tracy, 2 Cha. Rep. 16. See Stevenson v. Hay-ward, Prec. Cha. 310.

<sup>(</sup>n) Vol. Conv. 335.

<sup>(369)</sup> See Sterry v. Arden, 1 Johns. Ch. Rep. 268.

<sup>(370)</sup> See Dey v. Dunham, 2 Johns. Ch. Rep. 189, et seq.

II. It has in numerous cases been holden, that voluntary setlements are within the meaning of the Act, although the purchaser had direct notice of the settlement at the time of his purchase. This doctrine has, however, been frequently questioned, but appears to have been incontrovertibly settled by the case of Taylor v. Stile(o), which arose in Yorkshire(371).

In that case, A. settled lands, after his marriage, on his wife for life, and then sold the lands to B., who had notice of the wife's estate for life, and took counsel's opinion on the point. A. died, and his wife brought her bill to be let into her life estate. Lord Northington held the law to be clear, that a subsequent purchaser for a valuable consideration, (\*) though with notice, should set aside a voluntary settlement; but it being suggested that there was no valuable consideration, an issue was directed to try that fact, which coming on before Mr. Justice Bathurst, at York, he suffered the counsel to enter into the equity; and after hearing the argument, said, he knew Lord Hardwicke had determined, in twenty instances, in the same manner as Lord Northington. The consideration was proved, and the case came on to be heard before the Chancellor on the equity reserved, who thereupon dismissed the bill.

And in a recent case, Lord Chief Justice Mansfield held, that the Court could not, without overturning the settled and decided law, hold that the prior voluntary conveyance could defeat a conveyance to a purchaser for a valuable consideration (p). The point has been recently decided the same way by the Court of Exchequer (q), and

<sup>(</sup>o) Chancery, 1763, MS.; and see Evelyn v. Templar, 2 Bro. C. C. 148.

<sup>(</sup>p) Doe v. Martyr, 1 New Rep. 332.

<sup>(</sup>q) Doe v. Hopkins, 9 East, 70, cited.

<sup>(371)</sup> See Sterry v. Arden, 1 Johns. Ch. Rep. 270. S. C. on appeal, 12 Johns. Rep. 536.

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since that, by the Court of King's Bench(r), although in the last case the purchaser had notice of the settlement; and upon a trial at nisi prins, Mr. Justice Heath attached some importance to the circumstance of notice, and the jury found for the defendants claiming under the settlement, conceiving, as I am told, the settlement not to be fraudulent within the statute, though voluntary. In a still later case, the rule was again confirmed by the Court of Common Pleas(s). Nor will a purchaser be affected by a covenant in the settlement, that the purchase-money should be paid to trustees, to be laid out by them in other lands to be settled to the same uses(t).

But a deposit of the title-deeds by a settler after a (\*)voluntary settlement, will not prevail at law against the settlement; trover may be maintained for the deeds. The Court, in the case(u) in which this point arose, observed, that upon the deposit of the deeds the defendants required no more than a right to go into a Court of Equity to compel a legal conveyance. The language of the statute clearly specifies a purchaser; and how could they say that, upon a mere deposit of deeds entitling the party perhaps to apply to a Court of Equity, he becomes, in the language of the act, a purchaser either in fee-simple, fee-tail for life, lives or years?

Here it will be proper to consider, what is a voluntary settlement, and what will be deemed a valuable consideration within the act, so as to protect a settlement against subsequent purchasers.

Any conveyance executed by a husband in favor of

<sup>(</sup>r) Doe v. Manning, 9 East, 59.

<sup>(</sup>s) Hill v. Bishop of Exeter, 2 Taunt. 69; and see 18 Ves. jun. 141, per Sir Wm. Grant; and see Gully v. Bishop of Exeter, 10 Barn. & Cress. 601.

<sup>(</sup>t) Evelyn r. Templar, 2 Bro. C. C. 148. See 18 Ves. jun. 91. 93. 112.

<sup>(</sup>u) Kerrison v. Dorrien, 9 Bingh. 76; 2 Moo. & Scott, 114.

his wife or children, after marriage, which rests wholly on the moral duty of a husband or parent to provide for his wife and issue, is voluntary, and void against purchasers by force of the act(v)(372).

But a *purchase* in the name of a wife or child is not within the intention of the act, and consequently cannot be defeated by a subsequent purchaser(x)(373): and on the ground of policy, it seems that a settlement by a widow, previously to her second marriage, of her estate on the children of the first marriage, will not be deemed fraudulent(y)(374).

And a settlement made on a wife or children, prior to marriage, is a conveyance for valuable consideration, by reason of the marriage itself(z), but a settlement after a (\*)marriage in Scotland, will not be deemed a settlement upon valuable consideration, although, subsequently to it, the marriage is re-celebrated in England(a)(375).

(v) Woodie's case, cited in Colvile v. Parker, Cro. Jac. 158; Goodright v. Moses, 2 Blackst. 1019; Chapman v. Emery, Cowp. 278; Evelyn v. Templar, 2 Bro. C. C. 148. See Parker v. Serjeant, Finch, 146.

(x) Supra, ch. 15, s. 2, div. 11.

(y) Newstead v. Searles, 1 Atk. 265. See Cowp. 280; Cotton v. King, 2 P. Wms. 674.

(z) Colvile v. Parker, Cro. Jac. 158; Douglass v. Ward, 1 Cha. Ca. 99; Brown v. Jones, 1 Atk. 188.

(a) Ex parte Hall, 1 Ves. & Beam. 112.

(372) See Rundle v. Murgatroyd's Ass. 4 Dall. 304.; and note, p. 305. Reade v. Livingston, 3 Johns. Ch. Rep. 488. Bayard v. Hoffman, 4 Johns. Ch. Rep. 450. But a settlement after marriage, made in pursuance of a valid ante-nuptial agreement, is good. Reade v. Livingston, ut supra.

(373) See Livingston v. Livingston, 2 Johns. Ch. Rep. 539, et seq.

(374) See Pledger v. David's Admrs. 4 Des. 264.

(375) See Sterry v. Arden, 1 Johns. Ch. Rep. 261. Verplank v. Sterry, on appeal, 14 Johns. Ch. Rep. 536. Bradish v. Gibbs, 3 Johns. Ch. Rep. 550. Tunno v. Trezevant, 2 Des. 264, 269. The case of Greenhow v. Coutts, 4 Hen. & Munf. 486, is an exception to the general rule.

. (\*162)

The marriage consideration runs through the whole settlement, as far as it relates to the husband, and wife, and issue(b). Whether the marriage consideration will extend to remainders to collateral relations, so as to support them against a subsequent sale to a bona fide purchaser, is a subject which has been frequently discussed(c).

In a case in Lane(d), it is stated to have been held, that "if a man doth, in consideration that his son shall marry the daughter of B., covenant to stand seised to the use of the son, for life, and after to the use of other his sons, in reversion or remainder; these uses, thus limited in remainder, are fraudulent against a purchaser, though the first be upon good consideration, viz. marriage."-In this case, therefore, although the settler was under a moral obligation to provide for his sons, yet the remainders were not held good. They were, it will be observed, to take effect after a vested estate for life only. The case of Jenkins v. Keymis(e) has sometimes been considered a case, where the consideration of a marriage, and marriage portion, was held to run through all the estates raised by the settlement on the marriage, though the marriage was not concerned in them(f). The point, however, was not decided. It was merely the inclination of Hale's opinion. It was not necessary to decide the point, for Sir Nicholas was tenant for life, and Charles tenant in tail, with remainders over; the concurrence of both, therefore, was essential to give effect to the settlement, which brings it within (\*) the rule laid down in Roe v. Mitton(g). Besides, the son paid to his father the portion which he received with

<sup>(</sup>b) Nairn v. Prowse, 6 Ves. jun. 752.

<sup>(</sup>c) See 6 Ves. jun. 750; 18 Ves. jun. 92.

<sup>(</sup>d) Lane, 22; and see 2 Ro. Rep. 306; Jason v. Jervis, 1 Vern.

<sup>(</sup>e) 1 Lev. 150. 237; 1 Cha. Ca. 105.

<sup>(</sup>f) See 9 East, 69.

<sup>(</sup>g) Vide infra, and 18 Ves. jun. 92.

his wife(h). Lord Keeper Bridgman is also reported, by Levinz, to have agreed with Hale, that the marriage and portion of the first wife would extend to the issue of the second; but this opinion was extra-judicial, inasmuch as he relieved against the defective execution of the power(i); and it is observable, that no such opinion is stated in the report in Chancery(k). The case of White and Stringer(l) does appear to be an authority for such limitations, after a vested estate-tail; the remoteness of the remainder was much relied upon in its favor. But even in that case there were special circumstances; the remainder was excepted in the purchase deed, and the purchaser took a collateral security against it. It may be thought, therefore, that he only purchased the reversion in fee which was in the settler from whom he bought. The case of Osgood v. Strode(m), like Jenkins and Keymis, depends on the circumstance, that the father and son had each an interest in the estate, and one could not make the settlement without the other. Lord Macclesfield, however, considered the marriage portion not to go beyond the limitations to the husband, and wife, and issue; and his subsequent observations are addressed to creditors, and not to purchasers. The case of Roe and Mitton(n)depends on the same principle, and is so far an authority against the validity of the remainders, that the marriage consideration alone, was not considered sufficient to support limitations to the brothers. Lord Eldon has observed(o), that in the case of a father, tenant for life, with (\*)remainder to his son in tail, they may agree, upon the

<sup>(</sup>h) See 1 Cha. Ca. 103.

<sup>(</sup>i) See 1 Lev. 237.

<sup>(</sup>k) See 1 Cha. Ca. 105.

<sup>(</sup>l) 2 Lev. 105. See 2 P. Wms. 255.

<sup>(</sup>m) 2 P. Wms. 245.

<sup>(</sup>n) 2 Wils. 356.

<sup>(</sup>o) 18 Ves. jun. 92.

<sup>(\*164)</sup> 

marriage of the son, to settle, not only upon his issue, but upon the brothers and uncles of that son: and the question would be, whether they, though not within the consideration of the marriage, are not within the contract between the father and son, both having a right to insist upon a provident provision for uncles, brothers, sisters, and other relations, and to say to each other, "I will not agree unless you will so settle." The Court, his Lordship added, has held such a claim not to be that of a mere volunteer, but as falling within the range of the consideration. The case of Goring v. Nash(p), does not apply to the case under consideration. It was a question upon the specific execution of articles, and the rule of equity cannot weaken the effect of the statute.

This hasty view of the authorities seem to show, that the question was still open. A case lately occurred which seemed to call for a clear decision upon the point(q). A man, previously to his marriage, settled an estate to the use of himself, for life; remainder to trustees, in the usual way, to preserve; remainder to the first and other sons of the marriage, successively in tail male; remainder to the first and other sons of the husband by any aftertaken wife, successively in tail male; remainder to the daughters of the intended marriage, as tenants in common in tail, with cross remainders between them in tail, with reversion to himself in fee. The marriage took effect, and the wife died in her husband's life-time, without issue. The husband, not having been married again, mortgaged the estate. The legal estate was outstanding, and the question was, whether it was to be conveyed to the mortgagee or not. A case was directed to the King's Bench, in which the settlement was stated as a legal settlement: (\*)and it was stated, that the settler had sold

<sup>(</sup>p) 3 Atk. 186.

<sup>(</sup>q) Clayton v. Lord Wilton, before Lord Eldon, Ch.

for a full and valuable consideration. The question for the opinion of the Court was, whether the conveyance to the purchaser was a good and valid conveyance for a valuable consideration, against the issue of the plaintiff's second marriage. Lord Ellenborough, and the other Judges of B. R.(r), certified their opinion, that the conveyance, by the plaintiff, to the purchaser, was *not* a good and valid conveyance against the issue of the plaintiff's second marriage.

In the above case, therefore, the limitations to the collaterals were supported: but it is observable, that in order to support the limitations to the daughters of the first marriage, it was necessary to support the remainders to the sons of the second marriage. That was of itself a sufficient ground to support the remainders. It has, on the same principle, been considered, that an estate to a stranger may be supported, under a covenant to stand seised, if required to give effect to subsequent limitations within the consideration.

The same circumstances precisely, however, appear to have occurred in Roe v. Mitton, but this ground does not appear to have been urged in its support. It was decided upon the ground before mentioned: and Lord C. J. Wilmot said, that the whole of the question turned upon that. It is scarcely possible to suppose that the question was not discussed at the bar.

In a recent case in Ireland(s), the precise point seems to arise, although the facts are very numerous. In a settlement, previous to marriage, after the limitations to the issue of the marriage, which failed, remainders to the collateral relations of the settler were added, under which the grandson of an uncle of the settler claimed. The

<sup>(</sup>r) On the 31st May 1513.

<sup>(</sup>s) Fairfield v. Birch. The special verdict is shortly stated in Appendix, No. 25.

(\*)settler sold the estate to a purchaser, with full notice of the settlement. Upon a trial in the Court of Common Pleas, in Ireland, Lord Norbury, C. J. and Mr. Justice Mayne, were in favor of the defendant; and Mr. Justice Fox, and Mr. Justice Fletcher, in favor of the plaintiff. The latter, pro forma, allowed his opinion to be entered up for the defendant, and a writ of error was accordingly brought; but the author has not learned how the point was finally decided.

Since the above observations were written, the case of Johnson v. Legard has occurred, in which the abstract point was stated for the opinion of the Court of King's Bench. In that case, the wife had only a rent-charge, and therefore it might be supposed, that she stipulated for the settlement of the estate in remainder, on her husband's brothers, in order that the family dignity might be maintained, and her annuity be regularly paid. The Court of King's Bench certified their opinion, that none of the limitations to the collaterals was a good and valid limitation, as against the purchaser; and the Vice-Chancellor, without hearing any argument on this point, confirmed the certificate(t). That decree, however, has upon the circumstances been reversed by the Lord Chancellor on appeal, but still the point in question was not settled(u).

If an agreement be entered into before the marriage for a settlement of the estate(v)(376), or the husband receive

<sup>(</sup>t) Ch. 20, July 1818, MS.; 3 Madd. 283; 6 Madd. 60; vide infra.

<sup>(</sup>u) 1 Turn. & Russ. 281.

<sup>(</sup>v) Griffin v. Stanhope, Cro. Jac. 454; Sir Ralph Bovie's case, 1 Ventr. 193; but qu. where the agreement before the marriage is by parol. See Randal v. Morgan, 12 Ves. jun. 74; Battersbee v. Farrington, 1 Swapst. 106; 1 Wils. 88; and see Treat. of Powers, 4th edit. p. 424.

<sup>376)</sup> See Reads v. Livingston, 3 Johns. Ch. Rep. 481, 488.

an additional portion with his wife (w)(377), the settlement, (\*)although made after marriage, will be deemed valuable. So, even an agreement to pay the husband a sum of money as a portion, will support a settlement made after marriage, if the money is paid according to the agreement (x)(378). And where a woman has been married indiscreetly, and a trustee of a sum of money which the husband is entitled to in right of his wife, will not pay it unless he make a settlement on his wife, and a settlement is accordingly made, the settlement will equally be supported as if a bill had been brought against the husband to make a provision for his wife (y)(379).

So the concurrence of the wife in destroying an existing settlement on her for the benefit of the husband, is a sufficient consideration for a new settlement, although much more valuable than the former(z). And the better

- (w) Colvile v. Parker, Cro. Jac. 158; Jones v. Marsh, For. 64; Stileman v. Ashdown, 2 Atk. 477; Ramsden v. Hylton, 2 Ves. 304.
  - (x) Brown v. Jones, 1 Atk. 188.
  - (y) Ibid.
- (z) Scott v. Bell, 2 Lev. 70; Ball v. Bumford, Prec. Cha. 113; 1
   Eq. Ca. Abr. 354, pl. 5. See Clerk v. Nettleship, 2 Lev. 148.

a settlement after marriage, in pursuance of a parol agreement entered into before marriage, is not valid. S. C. p. 488. Nor, as it seems, will such settlement be valid against creditors, though the deed recite the ante-nuptial parol agreement. S. C. p. 491.; and see Scott v. Gibbon, 5 Munf. 86.

(377) See Carnes v. Smith, 2 Des. 299.

(378) And a parol promise by a father to his daughter's husband before marriage, to give him a tract of land, if he would marry his daughter, is a sufficient consideration to sustain a written agreement made after the marriage. Argenbright v. Campbell, 3 Hen. & Munf. 144. See Rundle v. Murgatroyd's Ass. 4 Data 305, and the note. See also, Sterry v. Arden, 1 Johns. Ch. Rep. 261.

(379) See Howard v. Moffut, 2 Johns. Ch. Rep. 206. The courts of Pennsylvania have no authority to direct a provision for the wife, when the husband applies for her personal property. Yohe v. Barnet, 1 Binn. 358, 365.

opinion, as well upon principle as in point of authority, seems to be, that the wife joining in barring her dower, for the benefit of her husband, will be a sufficient consideration for a settlement on her(a). It has been decided, that the wife parting with her jointure is a sufficient consideration. Now, if that which comes in lieu of dower is a valuable consideration, surely the dower itself must be equally valuable. Besides, where a woman is entitled to dower, the estate cannot be sold to advantage without her concurrence; she is a necessary party to any arrangement respecting the estate, and that alone seems a sufficient ground to support a settlement on her.

But if an unreasonable settlement be made upon a wife in consideration of her releasing her dower, it seems that equity in favor of subsequent purchasers will restrain her (\*)to her dower(b). These are points, however, which will not frequently arise, now that dower is placed under the husband's control(c).

If, upon a separation the husband settle an estate upon his wife, and a friend of her's covenant to indemnify the husband against any debts which she may contract, this will be a sufficient consideration to uphold a settlement as valuable, and not within the statute(d). Indeed, the Courts will anxiously endeavor to support a fair settlement, and nearly any consideration will be sufficient for that purpose. Therefore, if a person, whose concurrence the parties think essential, join in a settlement, his con-

<sup>(</sup>a) Lavender v. Blackstone, 2 Lev. 146. See and consider Evelyn v. Templar, 2 Bro. C. C. 148; 18 Ves. jun. 91; Pulvertoft v. Pulvertoft, 18 Ves. 84.

<sup>(</sup>b) Dolin v. Coltman, 1 Vern. 294.

<sup>(</sup>c) 3 & 4 Will. 4, c. 105.

<sup>(</sup>d) Stephens v. Olive, 2 Bro. C. C. 90; King v. Brewer, *ibid.* 93, n. See however Lord Eldon's argument in Lord St. John v. Lady St. John, 11 Ves. jun. 526; Worrall v. Jacob, 3 Mer. 256.

currence will be deemed a valuable consideration, although he did not substantially part with any thing(e).

It may be observed, that the statute of Elizabeth does not affect settlements of personal estate(f). Equity will not assist a mere stranger in making good a voluntary settlement upon him, unless the property was so transferred as to create the relation of trustee and cestui que trust. In a late case, however, a voluntary assignment of an equitable reversionary interest to trustees, for a stranger, was established, although as the settlement was merely equitable, the person claiming under it of course had not any right to the property at law(g). This decision (\*) is of great importance. The principle upon which it was decided should be applied with great caution to other cases.

III. We have seen what will be deemed a fraudulent or voluntary conveyance; but although a deed be merely voluntary or fraudulent in its creation, and voidable by a purchaser (i. e. would become void by a person purchasing the estate), yet it may become good by matter ex post facto: as if a man make a feoffment by covin, or without any valuable consideration, and the feoffee make a feoffment for valuable consideration, and then the first feoffor enter and make a feoffment for valuable consideration, the feoffee of the first feoffee shall hold the lands, and not the feoffee of the first feoffor: for although the estate of

<sup>(</sup>e) Roe v. Mitton, 2 Wils. 356. See Myddleton v. Lord Kenyon, 2 Ves. jun. 391; Hill v. Bishop of Exeter, 2 Taunt. 69; and 18 Ves. jun. 92; Gully v. Bishop of Exeter, 5 Bingh. 171; 2 Moo. & P. 105, 266, 276.

<sup>(</sup>f) Per Sir W. Grant, in the case of Sloane v. Cadogan, infra; Jones v. Croucher, 1 Sim. & Stu. 315.

<sup>(</sup>g) Sloane v. Cadogan, Rolls, Dec. 1808, MS. Appendix, No. 26. This case involved an important question upon the execution of a power. See ex parte Pye, 18 Ves. 140; Fenner v. Taylor, 2 Russ. & Myl. 195.

<sup>(\*169)</sup> 

the first feoffee was in its creation covinous, or voluntary, and therefore voidable, yet when he enfeoffed a person for valuable consideration, such person shall be preferred before the last(h)(381).

Lord Eldon has applied this rule to persons having only equitable rights. For where a person who had an absolute power of appointment over a sum of money to be raised under a trust-term, directed part of it to be raised in favor of a volunteer, who afterwards mortgaged such part, although the money appointed was deemed assets as between the creditors of the appointor and the appointee, yet the claim of the purchaser was preferred to that of the creditors: he having a preferable equity(i).

If a voluntary grantee gain credit by the conveyance to him, and a person is induced to marry him on account of (\*) such provision, the deed, though void in its creation as to purchasers, will, on the marriage being solemnized, no longer remain voluntary, as it was in its creation, but will be considered as made upon valuable consideration (j)(382).

<sup>(</sup>h) Prodgers v. Langham, 1 Sid. 133; Andrew Newport's case, Skin. 423; Wilson v. Wormal, Godb. 161, pl. 226; Doe v. Martyr, 1 New. Rep. 332; and see Parr v. Eliason, 1 East, 92. See also Lady Burg's case, Mo. 602; and 3 Atk. 377.

<sup>(</sup>i) George v. Milbank, 9 Ves. jun. 190. See 1 Mer. 638.

<sup>(</sup>j) Prodgers v. Langham, 1 Sid. 133; Kirk v. Clark, Prec. Cha. 275; S. C. by the name of Heisier v. Clark, 2 Eq. Ca. Abr. 46, pl. 13; Doe v. Routledge, Cowp. 705; East India Company v. Clavell, Gilb. Eq Rep. 37; Prec. Cha. 377; and see 9 Ves. jun. 193; O'Gorman v. Comyn, 2 Scho. & Lef. 147; Crofton v. Ormsby, ibid. 583.

<sup>(381)</sup> See Jackson v. Henry, 10 Johns. Rep. 185, 197. Fletcher v. Peck, 6 Cranch, 133. Bumpus v. Platner, 1 Johns. Ch. Rep. 213, 219. Astor v. Wells, 4 Wheat. 466, 487, 488. Roberts v. Anderson, 3 Johns. Ch. Rep. 377. et seq. S. C. on appeal, 18 Johns. Rep. 515. Frost v. Beckman, 1 Johns. Ch. Rep. 288, 300.

<sup>(382)</sup> See Sterry v. Arden, 1 Johns. Ch. Rep. 261. And it makes no difference whether any particular marriage was in contemplation, at the time of the voluntary settlement or not. Id. See also, Argenbright v. Campbell, 3 Hen. & Munf. 144.

And it is to be inferred from a late decision(k), that though it does not appear, that the friends of the wife did speculate upon the provision, and take it into consideration, yet it must be presumed that they did act upon it; and it cannot afterwards be disturbed. In the case alluded to, the question was, whether the husband, who was tenant for life, with remainder to his sons in strict settlement, had any equity to be relieved against the settlement, as made under an undue influence of parental authority; and it was determined, that the husband could not disturb it by reason of his subsequent marriage, although it did not appear that the friends of his wife took the settlement into consideration. The same principle applies to the case under consideration.

Notwithstanding the decisions as to voluntary settlements, it is seldom that a purchaser can be advised to accept a title where there is a prior settlement; for although apparently voluntary, yet if a valuable consideration were paid or given, parol evidence would be admissible of the transaction, in order to support the deed, and rebut the supposed fraud. This seems to be admitted by all the cases(l)(383). And in Ferrars v. Cherry(m), it was even holden, that although a settlement was apparently voluntary, and made after marriage, yet if the purchaser (\*)had notice of the settlement, and it prove to have been made in pursuance of articles before marriage, he would be bound by it, and could not protect himself by a prior legal estate, as he ought to have inquired of the wife's relations, who were parties to the deed, whether it was voluntary, or made pursuant to an agreement before marriage. Lord Hardwicke, indeed, has said, that he inclined

<sup>(</sup>k) Brown v. Carter, 5 Ves. jun. 862.

<sup>(1)</sup> See particularly Chapman v. Emery, Cowp. 278.

<sup>(</sup>m) 2 Vern. 384.

<sup>(383)</sup> See Sterry v. Arden, 1 Johns. Ch. Rep. 271.

to think it was in this case left uncertain on the face of the settlement, whether it was made before marriage or not; and he denied the authority of the case(n).

This opinion of Lord Hardwicke's cannot be safely relied on. Indeed, if notice of a settlement apparently voluntary, but which turns out to be made on valuable consideration, should not be deemed notice to a purchaser of the consideration, yet, unless he has a prior legal estate, he cannot protect himself against the settlement. Both parties being purchasers, equity must stand neuter, and the person claiming under the conveyance must recover at law.

There are but few cases on the effect of an ugreement by the settler to sell an estate after a voluntary settlement of it. In Leach v. Dean(o), the plaintiff's suit was to be relieved upon articles of agreement for the purchase of lands from the defendant, who before the articles had by deed conveyed the estate to his son, and the Court made the decree as prayed; "but as to the voluntary conveyance, the same is not hereby impeached, as between the father and son for any advancement, or any other thing thereby settled on the son, other than making good the articles of agreement; but the trustees to be paid their debts and engagements out of the purchase-money." It does not appear that the purchaser had notice of the settlement (\*)at the time he contracted. It was altogether a voluntary settlement. So in Douglasse v. Ward(p), the settlement was after the settler's first marriage on himself for life, remainder to his first and other sons in tail, and was therefore voluntary throughout. Previously to his second marriage, in consideration of a portion, he agreed to settle a jointure on his second wife, out of the settled

<sup>(</sup>n) Senhouse r. Earle, Ambl. 285. See 2 Ves. 60, n.

<sup>(</sup>o) 1 Cha. Rep. 78.

<sup>(</sup>p) 1 Cha. Ca. 99.

estate, and she was relieved against her own issue, who claimed under the settlement. It does not appear that she had notice of the settlement, and at the time of her articles there was no person in esse entitled under the settlement, and the settler himself could have destroyed the contingent remainders. Parry v. Carwarden(q), was also a suit by a purchaser, who had no notice of the settlement, and there the settler herself filed a bill to set aside the settlement, but died before the cause was at issue.

They were all cases in which the purchaser was plaintiff, and in none of them had he notice of the settlement. It is now settled, after a great struggle, that a purchaser under a conveyance may avoid a voluntary settlement, although he had notice of it, but that decision ought not to induce equity to consider Leach v. Dean, and that line of cases, as authorities for decreeing a specific performance where the purchaser has notice. If a construction of a statute be made, which is too late to overrule, but which, it is admitted, ought never to have been established, the principle of the rule should not be pushed to its greatest extent, but the rule should rather be confined strictly to the very circumstances under which it was established.

In Bennet v. Musgrove(r), Lord Hardwicke said, the distinction in equity was, that where a subsequent purchaser (\*) for a valuable consideration would recover the estate, and set aside or get the better of a precedent voluntary conveyance, if that conveyance was fairly made, without actual fraud, the Court will say, Take your remedy at law; but wherever the conveyance is attended with actual fraud, though they might go to law by ejectment, and recover the possession, they may come into this

<sup>(</sup>q) Dick. 544.

<sup>(</sup>r) 2 Ves. 51.

<sup>(\*173)</sup> 

Court to set aside that conveyance; which is a distinction between actual and presumed fraud, from its being merely a conveyance; and he adhered to the same rule in Oxley v. Lee(s).

From this it might be inferred, that equity would not compel a specific performance in favor of a purchaser who bought with notice of a prior voluntary conveyance made without fraud. But in a recent case, where, after a voluntary settlement, the settler entered into a contract to sell the settled estate to a person with full notice of the settlement, Sir Wm. Grant, Master of the Rolls, on mature consideration, decreed a specific performance against the parties claiming under the voluntary settlement(t)(384); and Lord Eldon appears to have approved of the decision(u), but he was not called upon to consider the point. It is certainly a very strong decision. The construction that a bona fide voluntary settlement was void under, the statute against a subsequent purchaser, who bought with notice, was not established without great opposition, and has always been considered a harsh interpretation. But the statute only operates where the purchaser acquires the estate under a conveyance. Equity generally follows the law; and therefore a sale of an equitable estate must, like a sale of a legal estate, operate to defeat a prior voluntary settlement; but that rule does (\*)not seem to apply to this case, where the contracting party has all his legal right, and the question is not in what channel an equitable interest actually in esse shall go, but whether the purchaser has any equitable interest, or, in other words, whether the Court will lend him its extraordinary aid, in order to carry the contract into a

<sup>(</sup>s) 1 Atk. 625.

<sup>(</sup>t) Buckle v. Mitchell, 18 Ves. jun. 101.

<sup>(</sup>u) Metcalfe v. Pulvertoft, 1 Ves. & Beam. 180.

<sup>(384)</sup> See Sterry v. Arden, 1 Johns. Ch. Rep. 271.

specific execution, instead of leaving him to his remedy at law. It were difficult to maintain, that the statute requires, by implication, equity to interpose, or that the interposition of the Court is called for by analogy to the legal rule; and unless that could be established, the plaintiff in such a suit might, with propriety, be told that he did not come there with clean hands. He knew that the seller had already settled the estate on another, and that he could not break through the settlement unless by the circuitous route of a sale. This was a purpose to which the plaintiff ought not to have lent himself, and at least he could not complain that he was left to his legal right, and that equity, who would not suffer the settler to break through the settlement for his own benefit, would not assist even a purchaser in defeating it where he bought with notice. The act relieves a man who has actually bought and paid for the estate, and obtained a conveyance of it; but it does not provide for the case, where not having completed his contract, he would not be damnified by the settlement; but would have his legal remedy against the vendor for breach of contract. Such a case did not call for any legislative remedy, and equity, it may be thought, ought to stand neuter.

In Buckle v. Mitchell, however, the settlement was subject to all the specialty and simple contract debts then due, or to be due, from the settler. The bill was filed after the seller's death, but that circumstance does not appear to have received much consideration.

(\*) In the case of Burke v. Dawson(x), Sir Wm. Grant, I am told, seemed to be of opinion, that although a purchaser, subsequently to a voluntary conveyance, might compel a specific performance, yet the vendor could not enforce the execution of the contract against an unwilling contractor. Indeed this seems to flow from the rule, that

<sup>(</sup>x) Rolls, March 1805, MS.

<sup>(\*175)</sup> 

the voluntary conveyance is binding on the settler himself; and the statute of Elizabeth was passed to protect purchasers, and not to enable persons to break through bona fide settlements, although made voluntarily, and without consideration.

In the later case of Smith and Garland(y) the very point arose. The bill was filed by the seller, who made the voluntary settlement. The defendant, the purchaser, bought without notice. He raised the objection to the title on account of the settlement by his answer, but submitted to perform the contract if a good title could be made. Sir Wm. Grant, Master of the Rolls, in a judgment which will long be remembered by those who heard it, expressly distinguished the case from his former decision in Buckle and Mitchell, and decided that the settler cannot maintain a bill for a specific performance. For the settlement was binding on him, and he had no right to disturb it.

In the more recent case of Johnson v. Legard, the settlement was in consideration of a marriage, and was not voluntary throughout. By an agreement in writing, in October 1807, Sir John Legard, the settler, agreed to sell and convey the estate to Mr. Watt, before the 6th of April 1808. And Mr. Watt agreed to secure, by mortgage of the estate and his bond, the purchase-money with interest; which principal sum was to remain upon the security at interest during the life of Sir John Legard, and for twelve (\*)calendar months afterwards. And it was agreed, that if Watt, his heirs or assigns, should be evicted from or deprived of the possession of the estate by any issue male of Sir John Legard, or by any other person claiming or deriving title under him, then the sums laid out in improvements or necessary alterations were to be repaid with interest, and also the purchase-money; and the security for

<sup>(</sup>y) Smith v Garland, 2 Mer. 123.

any part unpaid was to be void. Sir John Legard died. His creditors filed a bill against the remainder-men under the settlement, and against Watt, praying a specific performance. Watt by his answer objected to the title on account of the settlement, but submitted to perform the agreement on having a good title. By the decree it was ordered, that a case should be made for the opinion of the Judges of the King's Bench, and that such case should state, that a conveyance was actually made of the estate in question for a valuable consideration, by Sir John Legard, in his lifetime; and that the question should be, whether the limitations to the collaterals were good against the purchaser; and further directions were reserved. The result of the case before the King's Bench has already been stated. The cause came on before Sir John Leach, Vice-Chancellor, on further directions(z). The counsel for the remainder-men relied upon the case of Smith v. Garland, which had been decided since the case was directed to the King's Bench. The Vice-Chancellor held that that case was not an authority to be followed. It was however, argued, 1. That the statute of Elizabeth only applied to purchasers under actual conveyances, and that equity ought not to interfere. It never could be contended, that at law a purchaser having a mere right of action under a contract, and not having paid his purchase-money, could avoid a voluntary settlement, and it would be difficult to draw any line. (\*)2. That the agreement was a mere trick to set aside the settlement, without placing the purchaser in any danger. He never stood in the situation of a purchaser who could be deceived; and the second point in White v. Stringer was strongly relied upon(a). 3. That the creditors had not any right to file a bill. The settlement was binding

<sup>(</sup>z) 17 July 1818, MS.; 3 Madd. 283, a short note; Sutton v. Chetwynd, 3 Mer. 249.

<sup>(</sup>a) 2 Lev. 105.

<sup>(\*177)</sup> 

on the settler, and unless he placed a purchaser in a situation to avoid the settlement, the estate of the remainder-men could not be impeached after his death: there was no equity against them. 4. That Smith and Garland was a great authority, and a stronger case than that before the Court. There, as well as in this case, the purchaser submitted to perform the contract if a good title could be made. The Vice-Chancellor expressed an opinion that the creditors might file a bill although the settler could not, as there was a moral obligation on him to provide for his debts, and that the Court could make a decree between the co-defendants. For the remaindermen it was insisted, that the settler having solemnly on his marriage settled the estate, in default of his own issue, on the person who would succeed to his title, had already performed a moral obligation, and exhausted his power over the estate. The settlement was binding on him, and his creditors could not, claiming under him, have any rights to which he was not entitled. They did not attempt to impeach the settlement under the 13 Eliz. It was also submitted, that it would be an act of injustice to extend the rule as to decreeing relief between co-defendants to this case, because it at once took the estate from the remainder-men without any consideration. It did not follow that Watt the purchaser would file a bill; and if he did, the co-defendants might shape their defence in a way which they had not by the present bill been called upon to do. The Vice-Chancellor held, that the statute of 27 (\*)Elizabeth did not confine the relief to a purchaser by conveyance, but the act supposed there may be a purchaser by contract. The purchaser's right follows as against the representatives of the vendor. His Honor thought that the creditors would have a right to insist upon a specific performance, though the vendor had not; but that point did not arise, for Mr. Watt says he is ready to take the

estate if a good title can be made. Besides, the former decree concluded every question now raised. The defendants, the remainder-men, have appealed to the Lord Chancellor against this decision. Subsequently to the publication of the above observation, the appeal was heard and the decree below reversed(b).

In Cormick v. Trapaud(c), the settler was tenant in tail, with remainders to his brothers in tail, he agreed to settle the estate previously to his marriage, but did not extend the limitations to his brothers; he after marriage settled the estate with remainders to his brothers for life, and their issue in strict settlement, and afterwards suffered a recovery. It was held that the limitations to the brothers were voluntary limitations, although the settler was only tenant in tail.

If a trust be created by a voluntary settlement, the parties entitled under it may file a bill to have the trust carried into execution; but an injunction will not be granted restraining the settler from defeating the settlement by a sale(d); nor will the pendency of the suit prevent the settler from selling the property, or the purchaser from filing a bill in order to enforce his rights under the contract(e).

(\*)IV. It remains to consider the construction which the part of the statute relating to conveyances with power of revocation has received. And first it is to be observed, that the statute does not extend to particular powers, as a power to charge 2,000l. on an estate of considerable value, for such a power is not a power within the

<sup>(</sup>b) It is now reported, I Turn. & Russ. 281.

<sup>(</sup>c) 6 Dow, 60.

<sup>(</sup>d) Pulvertoft v. Pulvertoft, 18 Ves. 84.

<sup>(</sup>e) Metcalf v. Pulvertoft, 1 Ves. & Bea. 180. The widow pleaded lis pendens, and the plea was over-ruled by the Vice-Chancellor on the 10th August 1813. See 2 Ves. & Bea. 200.

(\*179)

words of the statute (being for a particular sum) to revoke, determine, or alter the estate(f).

But it is of course quite clear, that a settlement by which a power of revocation, or a power tantamount to it, is reserved to the grantor, is void against a subsequent purchaser(g)(385), and no artifice of the parties can protect the settlement. Therefore, although the power is conditional, that the settler shall only revoke on payment of a trifling sum to a third person(h), or with the consent of any third person who is merely appointed by the grantor(i), in these and the like cases the condition will be deemed colorable, and the settlement will be void against a subsequent purchaser.

But if a settlement is made with a power to the settler to revoke, so as that the money be paid to trustees to be invested in the purchase of other estates(k), or to revoke with the consent of a stranger bona fide appointed by the parties, and his consent is made requisite, not as a mere color, but for the benefit of all parties, the settlement will be valid, and cannot be impeached by a subsequent purchaser(l). This was determined in the case of Buller v. Waterhouse(m), which, however, Mr. Powell thought, did not settle the point, because all the claimants under (\*)the conveyance were purchasers for a valuable consideration(n). But it seems quite immaterial whether the set-

<sup>(</sup>f) Jenkins v. Keymis, 1 Lev. 150.

<sup>(</sup>g) Cross v. Faustenditch, Cro. Jac. 180; Tarback v. Marbury, 2 Vern. 510. See Lane, 22.

<sup>(</sup>h) Griffin v. Stanhope, Cro. Jac. 454.

<sup>(</sup>i) See 3 Rep. 82, b.; Lavender v. Blackston, 3 Keb. 526.

<sup>(</sup>k) Doe v. Martin, 4 Term Kep. 39.

<sup>(1)</sup> See Leigh v. Winter, 1 Jo. 411; and see Lane, 22.

<sup>(</sup>m) 2 Jo. 94; 3 Keb. 751; and see acc. Hungerford v. Earle, 2 Freem. 120; Lane, 22.

<sup>(</sup>n) Pow. on Powers, 330.

<sup>(385)</sup> See Riggs v. Murray, 2 Johns. Ch. Eep. 579, 580.

tlement itself is merely voluntary, or upon valuable consideration(o). The statute says, that all conveyances which the grantor has power to revoke shall be void against subsequent purchasers; and therefore, if parties giving a valuable consideration for a settlement choose to permit the grantor to reserve a power to revoke the settlement, they must suffer for their folly. The grantor, by virtue of the power, may revoke the settlement; and if he sell the estate without revoking it, the statute makes it void. In fact, if we hold, that settlements made upon valuable consideration are not within this provision, we must at the same time admit, that the Legislature did not intend to affect voluntary settlements, unless they were actually fraudulent; for voluntary settlements are void against purchasers under the second section of the act, which has already been discussed. This clause therefore would, under the construction put upon it by Mr. Powell, have scarcely any operation (386).

# (o) See acct. Rob. on Vol. Conv. 637.

<sup>(386)</sup> The Courts, in carrying into effect the statute against fraudulent conveyances and giving to it a proper interpretation, have not felt warranted in proceeding upon any broader ground, than this: that they are voidable only as to creditors or purchasers who may think proper to impeach them and are not utterly void. Thus, as against a fraudulent grantor, the conveyance is effectual to pass the title, and he and his representatives are not at liberty to set up a claim in opposition to it: Osborn v. Moss, 7 J. R. 161; and for all the purposes of a valid title in a bona fide purchaser under a fraudulent grantee, such grantee is, in contemplation of law, vested with a legal estate. The title vests, in the grantee, subject to be devested whenever the creditors or persons aggrieved think proper to call in question the validity of the transaction. When the conveyance is proved to be fraudulent, the judgment or decree of the court declares the deed of conveyance void in toto, as respects those who have impeached it; but not as to others This principle was settled in Anderson v. Roberts, 18 J. R. 515, and Mackie and Cairns, 5 Cowen, 547. One reason assigned in the latter case, why the judgment, which had been confessed by the assignor to the assignees

If a man having a power at a future day to revoke a settlement made by him, sell the estate before the day

subsequent to the assignment, was held to be ineffectual for any purpose was, that the assignment, although fraudulent as to creditors, was valid as between the parties, and, therefore, no lien could attach upon the property, assigned by means of the judgment. So, in Murray v. Riggs, 15 J. R. 571, where a deed fraudulent as to creditors, might be made good by subsequent acts between the grantor and the grantees before steps were taken to impeach it. These principles were stated by the Vice Chancellor in the late case of Henriques v. Hone, 2 Edw. Ch. R. 120, where Mosait assigned his property to H. & S. in trust for his creditors. Afterwards upon the application of judgment creditors, the assignment was decreed to be void on the ground of fraud. The complainant in this suit was then appointed receiver; and the assignees were ordered to deliver to him the trust property. Previously, however, to this decree a part of the property had been delivered to the defendant, who was an auctioneer; and he had sold the same and rendered an account thereof not knowing the true state of the property. When required to pay the receiver the proceeds of the property, the defendant refused on the ground that Moffat the debtor owed him a larger amount. But the V. Ch. held, that in no view of the cause had the defendant any right to retain or make the set off; and accordingly made a decree for the payment of the same, with interest and costs. "The effect of the decree was only to divest the assignees of their right and control over the property by virtue of the assignment, so as to have the property applied to lawful purposes, viz. to such of the creditors, who pursued their legal remedies and thereby acquired preferences over others. And this court then takes the property under its own charge through its officer, a receiver, and appropriates it accordingly.

"In practice, continued the V. Ch., it is usual to direct a release of the right of a party under a deed which is set aside as constructively fraudulent. Dey v. Dunham, 2 J. C. R. 194. But it would not be necessary to direct a release or reconveyance where a deed is declared an absolute nullity from fraud or imposition in the manner of obtaining it, except ex abundanti cautela. Livingston v. Hubbs, 2 J. C. R. 542, S. P. 2 Ves. jr. 294. The practice upon a decree of requiring a release or conveyance by a person holding under a voidable deed upon setting it aside, shows that the legal title, at least, remains in him, and does not return and revest in the original grantor. Hence, the propriety of requiring H. & S. (the assignees) to execute to the receiver a release or transfer of the property and its proceeds. It follows, that the receiver must be deemed de jure as well as de facto the assignee of H.

arrive, the settlement will be void against the purchaser at the time when the vendor, according to the terms of the power, might have revoked the settlement(p).

And a settlement made with power of revocation, will be void against a subsequent purchaser, although the grantor release or extinguish the power previously to the sale; otherwise the vendor might secretly release or destroy the power, and then show to the purchaser the conveyance containing the power of revocation, and so induce him to buy the  $\operatorname{land}(q)$ . In the case, however, in which this was decided, the settlement appears to have (\*)been voluntary, and the purchaser had not notice of the power being destroyed. But if a settlement should be made for valuable consideration, with a power of revocation, and the vendor should afterwards release the power for a valuable consideration, it is conceived that a purchaser, subsequently to the destruction of the power, could not prevail over the settlement.

The statute, as we have seen, operates conditionally, that is, where the first conveyance is not revoked according to the power. The act has no effect until the donee of the power sell the estate without revoking the first conveyance by virtue of his power. Suppose, then, a vendor professes to execute his power, but it is informally exercised, will the defect be cured by the statute? The Legislature intended to protect purchasers against fraudulent settlements, with powers of revocation, for it is essential, to bring a case within the act, that the estate should be sold, and the first conveyance not be revoked according to the

<sup>(</sup>p) Mo. 618; 3 Rep. 82 b; Bridg. 23.

<sup>(</sup>q) Bullock v. Thorne, Mo. 615.

<sup>&</sup>amp; S. and deriving in and through them title, and not immediately from Moffat. Were it otherwise, as between Moffat and H. & S. the assignment was good; and Hone could not retain the property to pay his own debt.

<sup>(\*181)</sup> 

power reserved to the grantor by such secret conveyance. The non-execution of the power is the fraud which the statute intended to avoid. The conveyances against which the act was intended to operate were presumed to be secret. It was not meant to relieve any man who was aware of the existence of the power, and might have required it to be exercised. The statute was not intended to operate as a mode of conveyance. But without insisting that where a purchaser is aware of the settlement, he must require the power to be executed, it may be urged, that where a purchaser does rest his title on the execution of the power, he rejects the aid of the Legislature, and takes his title under and not in opposition to the settlement; and can, therefore, only stand in the same situation as any other purchaser who has unfortunately taken an estate under a power defectively executed. The purchaser can scarcely be held to have a good legal (\*)title, unless the vendor not only attempted to execute the power, but actually conveyed the estate to him.



#### SECTION II.

Of Protection from Charitable Uses.

In the statute of charitable uses (r) is a proviso, that no person who shall purchase or obtain, upon valuable consideration of money or land, any estate or interest of or in any lands, &c. that shall be given to any of the charitable uses mentioned in the statute, without fraud or covin (having no notice of the same charitable uses),

r) 43 Eliz. c. 4.

shall be impeached by any decrees of the commissioners therein mentioned.

A purchaser who hath bought for an inadequate consideration is not within this proviso; and the adequacy of the consideration is measured according to the rule of the civil law; but if one purchase lands under half the value, and sell to another upon good consideration bona fide, the fraud is purged(s).

If a rent-charge be granted out of land to a charitable use, and the land is afterwards sold for valuable consideration to one who has no notice, it has been said the rent remains; because the purchase was of another thing that was not given to the charitable use(t): but in Tothil(u), the same case is referred to as an authority, that a purchaser coming in without notice of a rent-charge shall not be chargeable therewith, although given to a charitable use. The correct distinction seems to be, (\*)that where the rent-charge is legal, it must, like every other legal incumbrance, bind the purchaser, although he purchased without notice; but that where it is a mere equitable charge, the commissioners shall not make any decree for payment of it against the purchaser, if he purchased without notice.

If the first purchaser gave a valuable consideration, and yet had notice, all that claim in privity under his estate and title, whether they have notice or not, will be bound by the decrees of the commissioners (x).

This rule, as we shall hereafter see, differs from the general rule of equity in this respect—a subsequent purchaser without notice not being affected by notice in the person of whom he purchased.

<sup>(</sup>s) Vide supra, Vol. 1, p. 272; Duke, 177.

<sup>(</sup>t) East Greenstead's case, Duke, 64; and see Peacock v. Thewer, Duke, 82.

<sup>(</sup>u) Toth. 226.

<sup>(</sup>x) East Greenstead's case, Duke, 64; and see ibid. 173.

<sup>\*183)</sup> 

With this exception, however, the same rules seem to prevail in the construction of the act, with respect to notice, as are generally adopted by equity(y).

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#### SECTION III.

Of Protection from Acts of Bankruptcy.

I. By the statute 13 Eliz. c. 7, a purchaser would be defeated, although there should be forty years after an act of bankruptcy, and before a commission; and although the purchaser had no notice; for the words of the statute are general after bankruptcy, and the proviso in the end of the statute makes it still plainer, viz.: That assurances made by a bankrupt before bankruptcy, and bona fide, shall not be defeated.—This was hard doctrine against fair purchasers without notice; but so the law was(z).

With a view to prevent this injustice, and at the same time to preserve to creditors their just rights, and perhaps (\*)in analogy to the statute of fines, it was by the 21 Jac. 1,c. 19, s. 14, enacted, that no purchase for good and valuable consderation should be impeached by virtue of that act, or any other act theretofore made against bankrupts, unless the commission to prove him a bankrupt should be sued forth against such bankrupt within five years after he should become a bankrupt.

But even after this provision it was dangerous to purchase an estate from a trader; for an act of bankruptcy

<sup>(</sup>y) Ibid.

<sup>(</sup>z) See For. 66, 67.

might have been committed within five years before, which would reach the estate(a).

It has been decided, that if a purchaser have notice of the act of bankruptcy, he is not a purchaser within the meaning of the statute, and consequently is not entitled to the benefit of it(b): but if the act of bankruptcy arise by the execution of a fraudulent deed, notice of the deed, without notice of the fraud, will not be deemed notice of the bankruptcy(c). This is a point which frequently occurs in practice; a deed appears upon an abstract, by which the owner, being subject to the bankrupt laws, conveys all his estate for the benefit of his creditors, and to which all the creditors are stated to be parties(d). Now, supposing the title to be so circumstanced, that the purchaser could not be affected by an act of bankruptcy, unless he had notice of it, the question at once arises, whether notice of the deed is notice of any creditor not having executed it, in which case the deed would be fraudulent, and an act of bankruptcy. This is a very important question, as it is impossible to give evidence of all the creditors having executed. But it seems to follow from the decision in Read v. Ward, that the purchaser (\*) would not be held to have had notice that all the creditors were not parties to the deed; and this opinion appears to be adopted in practice.

To avoid a purchase, the act of bankruptcy must be committed within five years before the commission(e). The five years are, however, computed from the last act of bankruptcy preceding the sale; for the words of the statute are not after he shall first be a bankrupt, but only

<sup>(</sup>a) See 4 Ves. jun. 398.

<sup>(</sup>b) Read v. Ward, 2 Eq. Ca. Abr. 119; 7 Vin. Abr. 119; Mountford v. Ponten, 1 Mont. 79.

<sup>(</sup>c) S. C.

<sup>(</sup>d) See now 6 Geo. 4, ch. 16, s. 4, post.

<sup>(</sup>e) Radford v. Bloodworth, 1 Lev. 13.

<sup>(\*185)</sup> 

after becoming bankrupt generally (f); and, therefore, if after several acts of bankruptcy an estate is sold by the bankrupt, and a commission issues within five years from the last act, the sale will be avoided (g). But no act of bankruptcy after the sale will affect the purchaser; and consequently his title will not be impeached by any commission issued after five years from the act of bankruptcy immediately preceding the sale (h).

II. Thus the law stood until Romilly's act for amending the laws relating to bankrupts(i), by which, after reciting that great inconveniences and injustice had been occasioned by reason of the fair and honest dealings and transactions of and with traders being defeated by secret acts of bankruptcy, in cases not already provided for, or not sufficiently provided for by law, it was enacted, that in all cases of commissions thereafter to be issued, all conveyances by, all payments by and to, and all contracts and other dealings and transactions by and with, any bankrupt bona fide made or entered into more than two calendar months before the date of such commission, (\*) should, notwithstanding any prior act of bankruptcy committed by such bankrupt, be good and effectual to all intents and purposes whatsoever, in like manner as if no such prior act of bankruptcy had been committed, provided the person or persons so dealing with such bankrupt had not at the time of such conveyance, payment, contract, dealing or transaction, any notice of any prior act of bankruptcy by such bankrupt committed, or that he was insolvent, or had stopped payment. And it is

<sup>(</sup>f) Spencer v. Venacre, 1 Keb. 722; 1 Lev. 14.

<sup>(</sup>g) Jelliff v. Horn, 1 Keb. 12, cited; Radford v. Bloodworth, 1 Lev. 13; 1 Keb. 11.

<sup>(</sup>h) Spencer v. Venacre, 1 Keb. 722; and see Cullen's B. L. 241.

<sup>(</sup>i) 46 Geo. 3, c. 135, extended to executions and attachments by 49 Geo. 3, c. 121, s. 2.

provided, that the issuing of a commission of bankruptcy against such bankrupt, although such commission shall afterwards be superseded, or the striking of a docket for the purpose of issuing a commission against such bankrupt, whether any commission shall have actually issued thereupon or not, shall be deemed notice of a prior act of bankruptcy for the purposes of the act; if it shall appear that an act of bankruptcy had been actually committed at the time of the issuing such commission, or striking such docket.

The better opinion appears to be, that neither an act of bankruptcy, nor a commission of bankruptcy, is of itself notice to a purchaser; and that notwithstanding the statute of James, a purchaser who has got in a prior legal estate without notice of a commission or act of bankruptcy, may protect himself against it(k). But under Romilly's act, a purchaser cannot avail himself of a prior legal estate if a commission was actually issued, or a docket struck previously to his purchase, although he had not actual notice of the issuing of the commission or striking of the docket, because the statute expressly makes those acts constructive notice.

It should seem, however, that the provision in the statute of James, in favor of purchasers, is not repealed by the late act. If it be not, then a purchaser will not (\*)be bound by the constructive notice established by the late act, where he does not claim the benefit of it. Thus, if it should appear that a commission had been issued or a docket struck prior to the purchase, the purchaser could not claim the benefit of the late act, although he had not actual notice of the commission or docket; but if more than five years had elapsed since the purchase, and a new commission were then to issue, it should seem that he may insist upon the benefit of the act of James. So where a

<sup>(</sup>k) See this considered, infra, Ch. 17.

<sup>(\*187)</sup> 

purchaser bona fide, and without notice, has a prior legal estate, he may, notwithstanding either of the acts, make use of it as a protection against the assignees. The grounds of this opinion upon the late act are, that it was passed in favor of purchasers; that it does not say affirmatively, that a commission issued two months after a conveyance shall bind where a commission has been issued, or a docket struck prior to the purchase, but merely enacts negatively, that a commission issued after that time shall not bind, unless a commission was issued or a docket struck before the purchase.

The express enactment, that the striking a docket or issuing a commission shall operate as a constructive notice to purchasers, seems to exclude all other kinds of constructive notice, so far as any aid is sought from this statute: the Legislature having expressly declared that these two particular acts shall be deemed constructive notice, it must be inferred that they intended no other act should have that effect. Therefore there is ground to contend, that if a commission has not been issued or a docket struck, a purchaser may avail himself of the statute, although, for instance, his solicitor had express notice that the vendor had committed an act of bankruptcy. Against this construction, it might, perhaps, be argued, that as neither the striking of a docket, nor the issuing of a commission, was prior to the statute of itself (\*)notice to a purchaser, the intention must have been to make those acts constructive notice, in addition to the acts which equity already deemed tantamount to actual notice. Cases of actual notice will entirely deprive the purchaser of the benefit of the act.

The provision which makes the striking of a docket notice, in all events, was not approved of (l). It was not originally in the act, and has since been repealed (m).

<sup>(</sup>t) Rex v. Bullock, 1 Taunt. 71; 14 Ves. jun. 452.

<sup>(</sup>m) 49 Geo. 3, c. 121.

It is, as we have seen, also provided, that to claim the benefit of the act, the purchaser must not have notice that the bankrupt was insolvent, or had stopped payment. If it should be thought that insolvency and stopping payment do not mean the same thing, considerable difficulty must frequently arise on this provision. Insolvency of itself appears to include not merely a stoppage of payment, but an inability to pay; unless, however, the evidence of insolvency be confined to an actual stoppage, it would not be easy to say what shall be deemed notice of it.

Since the above observations were written, it has been decided, that the insolvency mentioned in the statute, means a general inability in the bankrupt to answer his engagements(n).

In a late case(o), Mr. Justice Le Blanc said, that he took insolvency, as it respects a trader, to mean that he is not in a situation to make his payments as usual, and that it does not follow that he is not insolvent because he may ultimately have a surplus upon the winding up of his affairs; and Mr. Justice Bayley agreed, that insolvency means that a trader is not able to keep his general (\*)days of payment, and that he is not to be considered as solvent because possibly his affairs may come round.

The provision, that the *issuing* of a commission shall be notice, although such commission shall afterwards be superseded, extends even to a commission which has been superseded, without being opened, although it was contended, that the Legislature must have meant a commission opened, and acted upon, though afterwards superseded (p).

<sup>(</sup>n) Anon. 1 Camp. Ca. 491, n. See Abraham v. George, 11 Price, 423; Spratt v. Hobhouse, 4 Bing. 173; 12 Moo. 395, S. C.

<sup>(</sup>o) Bayly v. Schofield, 1 Mau. & Selw. 338.

<sup>(</sup>p) Watkins v. Maund, 3 Camp. Ca. 308. (\*189)

III. The law has again been altered by the act of the 6th of the late King. The observations already made show how the law stood before that act, which is still necessary to be known, and therefore those observations are retained.

The act referred to contains the following provisions relating to purchasers:

1. By the 81st section(q) it is enacted, that all conveyances by, and all contracts and other dealings and transactions by and with, any bankrupt bona fide made and entered into more than two calendar months before the date and issuing of the commission against, and all executions and attachments against, the lands and tenements or goods and chattels of such bankrupt, bona fide executed or levied more than two calendar months before the issuing of such commission, shall be valid, notwithstanding any prior act of bankruptcy by him committed, provided the person or persons so dealing with such bankrupt, or at whose suit, or on whose account, such execution or attachment shall have issued, had not at the time of such conveyance, contract, dealing or transaction. (\*)or at the time of executing or levying such execution or attachment, notice(r) of any prior act of bankruptcy by him committed(s); provided also, that where a commission has been superseded, if any other commission shall issue against any person or persons comprised in such first commission within two calendar months next after it shall have been superseded, no such conveyance, contract, dealing or transaction, execution or attachment. shall be valid, unless made, entered into, executed or levied more than two calendar months before the issuing the first commission.

<sup>(</sup>q) 6 Geo. 4, c. 16; see 1 & 2 Will. 4, c. 56; 3 & 4 Will. 4, c. 47.

<sup>(</sup>r) That he was insolvent or had stopped payment omitted.

2. And by section 83 it is enacted, that the issuing of a commission shall be deemed notice of a prior act of bankruptcy (if an act of bankruptcy had been actually committed before the issuing of the commission), if the adjudication of the person or persons against whom such commission has issued shall have been notified in the London Gazette, and the person or persons to be affected by such notice may reasonably be presumed to have seen the same(t).

3. And by s. 85 it is enacted, that if any accredited agent of any body corporate or public company shall have had notice of any act of bankruptcy, such body corporate or company shall be thereby deemed to have had such notice (u).

4. And by the 86th section it is enacted, that no purchase from any bankrupt, bona fide and for valuable consideration, where the purchaser had notice at the time of such purchase of an act of bankruptcy, by such bankrupt committed, shall be impeached by reason thereof, unless (\*)the commission against such bankrupt shall have been sued out within twelve calendar months(v) after such act of bankruptcy(w).

5. And by the 87th section it is enacted, that no title to any real or personal estate sold under any commission, or under any order in bankruptcy, shall be impeached by the bankrupt, or any person claiming under him, in respect of any defect in the suing out of the commission, or in any of the proceedings under the same, unless the bankrupt shall have commenced proceedings to supersede the said commission, and duly prosecuted the same within twelve calendar months from the issuing thereof. But

<sup>(</sup>t) See Spratt v. Hobhouse, 4 Bing. 173; 12 Moo. 395, S. C.

<sup>(</sup>u) Ibid.

<sup>(</sup>v) Instead of five years.

<sup>(</sup>w) 21 Jac. 1, c. 19, s. 14.

<sup>(\*191)</sup> 

this provision does not protect a purchaser against the claim of an assignee under a subsequent commission, after the first commission under which he purchased has been superseded(x).

6. And it is enacted by section 4, that where any trader within the act, shall, after the act shall have come into effect, execute any conveyance or assignment by deed to a trustee or trustees of all his estate and effects for the benefit of all the creditors of such trader, the execution of such deed shall not be deemed an act of bankruptcy, unless a commission issue against such trader within six calendar months from the execution thereof by such trader; provided that such deed shall be executed by every such trustee within fifteen days after the execution thereof by the said trader; and that the execution by such trader, and by every such trustee, be attested by an attorney or solicitor; and that notice be given within two months after the execution thereof by such trader, in case such trader reside in London, or within forty miles thereof, (\*)in the London Gazette, and also in two London daily newspapers; and in case such trader does not reside within forty miles of London, then in the London Gazette, and also in one London daily newspaper, and one provincial newspaper published near to such trader's residence, and such notice shall contain the date and execution of such deed, and the name and place of abode respectively of every such trustee, and of such attorney or solicitor.

<sup>(</sup>x) Gould v. Shoyer, 6 Bing. 738; 4 Moo. & P. 635, S. C. (\*192)

## SECTION IV.

Of Protection from Judgments and Recognizances.

I. By a fiction in law, all judgments were supposed to be judgments of the first day of the term in which they were obtained; and therefore a purchaser might have his estate incumbered by a judgment acknowledged subse-

quently to his purchase(y).

To obviate this injustice, it was enacted(z), that any judge or officer of any of His Majesty's Courts of Westminster, that should sign any judgments, should, at the signing of the same, set down the day of the month and year of his so doing, upon the paper book, docket or record, which he should sign; which day of the month and year should also be entered on the margin of the roll of the record where the said judgment should be entered, and such judgments, as against purchasers bona fide for valuable considerations of lands, tenements or hereditaments, (\*)to be charged thereby, should in consideration of law be judgments only from such time as they should be so signed, and should not relate to the first day of the term whereof they were entered, or the day of the return of the original, or filing the bail. And this provision has been since extended to the Courts of Great Session in Wales, and to the Courts of Session in the counties palatine of Chester, Lancaster and Durham(a).

<sup>(</sup>y) Vide supra, Vol. 1, p. 539, as to judgments.

<sup>(</sup>z) 29 Car. 2, c. 3, s. 14, 15.

<sup>(</sup>a) 8 Geo. 1, c. 25, s. 6.

<sup>(\*193)</sup> 

But though this settled all differences respecting the fiction of law, whereby judgments were supposed to be all of the first day of the term, by compelling the party to set down the particular period when the judgment was signed, and declaring that, as against purchasers bona fide for a valuable consideration, the lands, tenements and hereditaments to be charged thereby, should be charged only from such time as the judgment was signed; yet, inasmuch as it did not compel the plaintiff to carry in the judgment roll, purchasers and others were rendered almost incapable of discovering what judgments were recovered(b).

And, therefore, by another statute(c) it was enacted, that the clerk of the essoigns of the Court of C. B., the clerk of the doggets of the Court of B. R. and the master of the office of pleas in the Court of Exchequer, should make and put into an alphabetical dogget, by the defendants names, of all the judgments entered in their respective Courts of Michaelmas and Hilary terms, before the last day of the ensuing terms; and of the judgments of Easter and Trinity terms, before the last day of Michaelmas term; and that no judgments should affect lands or tenements as to bona fide purchasers for valuable consideration, (\*)unless docketed and entered according to the act; and it is directed that every dogget shall be put into and kept in books in parchment, to be searched by all persons, at reasonable times, paying fourpence for searching every term.

"Dockets or indexes to judgments were in use long before this statute. They were invented by the Courts for their own ease, and the security of purchasers, to avoid the trouble and inconvenience of turning over the rolls at

<sup>(</sup>b) Robinson v. Harrington, 1 Pow. Mort. 518, 4th edit. S. C. MS.

<sup>(</sup>c) 4 & 5 W. & M. c. 20, made perpetual by 7 and 8 W. 3, c. 36,

large. The statute of William and Mary did not supersede the former practice of docketing the judgment in parchiment or paper, which is still necessary to be done by the attornies on entering and bringing in the rolls; but was intended to operate in addition to that practice, by requiring the dockets to be entered in alphabetical order by the officers of the Court(d)."

Now, upon the provisions of this act it has been observed, that judgments cannot be docketed after the time mentioned in the act; and the practice of the clerks in docketing them after that time is only an abuse for the sake of their fees, and ineffectual to the party(e). And as the object of the act is to enable purchasers to discover judgments by the names of the persons against whom they are entered, if the name of a defendant be falsely entered, as Compton for Crompton, the judgment will be void against purchasers, and the Court will not amend the record(f).

If it is wished to enter a judgment as of a term, it must be actually entered before the essoign-day of the succeeding term; and Lord C. J. Holt has said, that if judgment be signed in a term, and in the subsequent vacation the (\*)defendant sells lands, and before the essoigns of the next term the plaintiff enter his judgment, it shall affect the lands in the hands of the purchaser(g). And although this has been doubted(h), yet it seems to be correct, as the judgment is not affected by the act of Charles 2, or that of William and Mary. The judgment binds only according to the letter of the statute of Charles; and it is not required to be docketed by the act of William and

<sup>(</sup>d) Tidd's Pract. 858. 860. 3d edit; Gilb. C. P. 140.

<sup>(</sup>e) Per Master of the Rolls, in Forshall v. Coles, Appendix, No. 20, sed qu.

<sup>(</sup>f) Sale v. Crompton, 1 Wils. 61; 2 Str. 1209.

<sup>(</sup>g) Hodges v. Templar, 6 Mod. 191.

<sup>(</sup>h) Tidd's Pract. 857; Bac. Abr. by Gwill. tit. Execution (I) n. (\*195)

Mary, till before the last day of the subsequent term. And there is no inconvenience in this rule, for I find, upon inquiry, that the practice is to index judgments as soon as they are signed, in order to enable purchasers to search for them with facility. But this practice is wholly independent of the directions of the act by which judgments are required to be docketed.

Although a judgment is not duly docketed, and therefore void against a purchaser, yet if the purchaser has notice of it, and did not pay the value of the estate, it will be presumed that he agreed to pay off the judgment, and equity will compel him to pay  $\mathrm{it}(i)$ .

The general rule of equity would warrant an assertion, that the case would be the same although no agreement were made. In the case of Forshall v. Coles(k), however, it appears that the Master of the Rolls held decidedly that notice of a judgment not docketed was not material. But this decision cannot be relied on: the effect of it would be to overrule all the decisions on the statutes for registry (l). They were passed for precisely the same purpose as the act of William and Mary, viz. to enable purchasers readily to discover incumbrances; and (\*)therefore, if a purchaser has notice of any judgment, the statute does not in equity extend to him, as he is already in possession of what the Legislature intended to furnish him with. This point, upon which a considerable difference of opinion recently prevailed in the Profession, has lately been decided by Lord Eldon in favor of the judgment creditor. The case of Forshall v. Coles is therefore overruled(m).

<sup>(</sup>i) Thomas v. Pledwell, 7 Vin. Abr. 53, pl. 5; 2 Eq. Ca. Abr. 684, pl. 7.

<sup>(</sup>k) 7 Vin. Abr. 54, pl. 6; 2 Eq. Ca. Abr. 592, pl. 8; S. C. MS. a better note, Appendix, No. 20.

<sup>(1)</sup> Vide infra, sect. 5.

<sup>(</sup>m) Davis v. Earl of Strathmore, 16 Ves. jun. 419.

The statute of 21 Jac. 1(n), for the better division of the estates of bankrupts, enacted, that all creditors by judgment, whereof execution was not served and executed before the bankruptcy, should only come in rateably with the other creditors; and this is carried still farther by the late act(o). In general, therefore, judgments against a bankrupt are not material where the estate is sold by his assignees. In a late case(p), a man sold a freehold estate, and the conveyance was executed by all the material parties; but no part of the money was paid, and the conveyance remained in the seller's hands. In this stage he became a bankrupt, and a commission issued against him; and it appeared that judgments were entered up against him previous to the bankruptcy. The purchaser required satisfaction to be entered up on the judgments. This was resisted on the ground that, by the statute of James 1, the judgment debts were reduced to a level with the simple contract debts, for the object of that statute was to put all the creditors on an equality (q). Now, it was clear that the seller had an equitable lien on the land for its whole value, and that the money would go to the assignees: and, consequently, if the judgment creditors could execute their judgments against the purchaser, they (\*) would obtain a preference over the other creditors; for, of course, the purchaser was not to pay his money, and also be liable to the judgments. The case of Orlebar v. Fletcher(r), appeared to be a stronger case against the judgment creditors than the present, for there the purchaser had paid the greater part of the purchase-money before the bankruptcy; and although, in the present case,

<sup>(</sup>n) Ch. 19, s. 9.

<sup>(</sup>o) 6 Geo. 4, c. 16, s. 108.

<sup>(</sup>p) Sloper v. Fish, Rolls, 29th July 1813; 2 Ves. & Bea. 145.

<sup>(</sup>q) Lee Newland v. ---, 1 P. Wms. 92.

<sup>(</sup>r) 1 P. Wms. 737.

<sup>(\*197)</sup> 

the conveyance was executed, yet it was not delivered, and therefore might be considered as an escrow(s); and even if it operated to vest the legal estate in the purchaser, yet the case was within the spirit and meaning of the act of James; because the estate in effect formed part of the property to be distributed. Upon these grounds the assignees filed a bill against the purchaser for a specific performance; but the Master of the Rolls thought the title too doubtful to enable him to force it on the purchaser.

In a later case, however(t), where a man agreed to sell his estate, and became a bankrupt before the conveyance was executed, the same learned Judge held that the assignees of the seller could make a title without the concurrence of judgment creditors whose judgments were duly docketed before the bankruptcy.

The 21 Jac. 1, c. 24, which enables persons to have new execution against the property of debtors dying in execution, provides, that the act shall not extend to give liberty to any person or persons, their executors or administrators, at whose suit or suits any such party shall be in execution, and die in execution, to have or take any new execution against any the lands, tenements or hereditaments (\*)of such party dying in execution, which shall at any time after the said judgment or judgments be by him sold bona fide for the payment of any of his creditors, and the money which shall be paid for the lands so sold either paid or secured to be paid to any of his creditors, with their privity and consent, in discharge of his or their due debts, or of some part thereof.

<sup>(</sup>s) Derby Canal Company v. Wilmot, 8 East, 360. See O'Dell v. Wake, 3 Camp. 394, where the deed was in the possession of the purchaser's solicitor.

<sup>(</sup>t) Sharpe v. Roahde, 2 Rose, 192.

II. Formerly, if goods had been sold during long vacation, a *fieri facias* tested the preceding term would have over-reached the sale, although issued subsequently to it(u).

To remedy this inconvenience, it was enacted (x), that no writ of fieri facias, or other writ of execution, should bind the property of goods against whom such writ of execution was sued forth, but from the time that such writ should be delivered to the sheriff, under-sheriff or coroners, to be executed; and for the better manifestation of the said time, the sheriff, under-sheriff and coroners, their deputies and agents, should upon the receipt of any such writ, without fee for doing the same, indorse upon the back thereof the day of the month or year whereon he or they received the same(I).

It has been said(y), that the whole intention of this provision was to secure purchasers, under a second execution, against any former writ which might have been delivered to the sheriff. But a purchaser under a second execution was always protected against any prior writ of (\*) which he had no notice, by the rule of law, independently of the statute of frauds(z); and the reason already given appears to be the correct one.

It has been doubted whether the word "goods," in the act referred to, extends to leasehold estates; and it

<sup>(</sup>n) Houghton v. Rushley, Skin. 257; and see Comb. 145; 2 Ventr. 218.

<sup>(</sup>x) 29 Car. 2, c. 3, s. 16.

<sup>(</sup>y) Per Ashhurst, J. in casu Hutchinson v. Johnson, 1 Term Rep. 731.

<sup>(</sup>z) See Smallcomb v. Buckingham, 1 Lord Raym. 251; Carth. 419; Payne v. Drewe, 4 East, 523.

<sup>(</sup>I) This statute only operates in favor of purchasers. It was not passed for the benefit of the debtor. Houghton v. Rushley, sup. and Norden v. Needham, Pasch. 3 W. & M. B. R. MS. In this last case it was held that deeds and writings could not be taken in execution.

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appears by two opinions published in Mr. Rigge's Observations on Registry, that Mr. Serjeant Hill thought it did not include leaseholds, but that they might be extended on a writ of elegit; and consequently were bound from the time the judgment was duly entered and docketed; and that, on the other hand, Mr. Butler thought the word "goods" did comprise leaseholds, which therefore were not bound until delivery to the sheriff of the writ of execution.

It must be admitted, that a leasehold for years may be extended on an elegit, if it is in the possession of the defendant at the time execution is awarded(a). It was, however, settled long before the statute of Charles 2, that a sale of chattels was good after judgment, although not after execution awarded(b); so that as to a term of years the command to the sheriff in an elegit does not overreach the sale in the same manner as it does in the case of a freehold estate. This distinction appears to have been expressly taken in Fleetwood's case.

With respect to judgments, the statute of frauds hath two branches: the one relating to judgments against real estate; the other relating to executions on judgments against goods or personal estate. The act being a remedial (\*)one, the mode of discovering whether leaseholds are bound by the last provision, seems to be, first, an inquiry whether purchasers of leaseholds were within the mischief the Legislature intended to guard against; and if they were, then an inquiry whether the word "goods" is sufficiently comprehensive to effectuate the intention of the act.

<sup>(</sup>a) Sir Gerard Fleetwood's case, 8 Co. 171; and see and consider 31 Ass. p. 6; 38 Ass. p. 4; and see 2 Inst. 395; Gilb. Ex. 33. 35.

<sup>(</sup>b) Sir Gerard Fleetwood's case, 8 Co. 171; and see 1 Fitz. Abr. tit. Execution, pl. 108; 2 Ro. Abr. 157; Wilson v. Wormol, Godb. 161, pl. 226; Shirley v. Watts, 3 Atk. 200.

First, the act was passed for the quiet and in favor of purchasers; and admitting that leaseholds were only bound from the award of execution, it is evident that the first provision in the act does not apply to leaseholds; which are, therefore, clearly within the mischief intended to be guarded against by the second provision, as a sale of them is liable to be overturned by a writ awarded in vacation, and tested in the preceding term; and if we do not hold leaseholds to be within the operation of this branch of the act, purchasers of them are still liable to the danger which the statute intended to guard them against.

Assuming that leaseholds are within the meaning, it remains to inquire whether they are within the words of the act. This depends upon the construction which the word "goods," in the act, ought to receive.

Biens, bona, Sir Edward Coke says(c), includes all chattels, as well real as personal. Chattels, he adds, is a French word, and signifies goods, which by a word of art we call catalla. And this, as Sir Wm. Blackstone observes(d), is true if understood of the Norman dialect for in the Grand Coustumier(e), we find the word chattels used and set in opposition to a fief or feud, so that not only goods, but whatever was not a feud, were (\*)accounted chattels; and the learned commentator is of opinion that our law adopts it in the same large, extended, negative sense.

This opinion appears to be correct, if confined to the word chattels; but it must not be extended to the word goods, which, in our law, has a more confined operation.

By the civil law, however, bona includes all chattels, as well personal as real; and therefore a general bequest

<sup>(</sup>c) Co. Litt. 118. b. (d) 2 Com. 385, 7th edit. (e) C. 87. (\*201)

of all one's goods will pass a leasehold estate (f), because the civil law guides the construction of bequests of personalty; but it seems clear, that in an assignment, which must be construed according to the rules of the common law, a leasehold estate will not pass under the word goods(I).

It appears, therefore, that in some cases that word will include leaseholds, while in others it will not; and the true rule to discover what sense was affixed to it in the statute of frauds seems to be, an investigation of the meaning usually attached to the same word in acts of parliament passed before that statute.

By the statute of West. 2.(g), it is enacted, that where, (\*)upon the death of any person intestate and indebted, the  $goods\ (bona)$  shall come to the ordinary, he shall be bound to pay the debts so far as the  $goods\ (bona)$  will extend, in the like manner as executors would have been if he had left a will. And in the 31st Edw. 3.(h), for the commitment of administration, the word  $goods\ (biens)$  only is used.

In both these statutes, therefore, the word goods was considered as denoting personalty in general. It may

<sup>(</sup>f) Portman v. Willis, Cro. Eliz. 386.

<sup>(</sup>g) 13 Ed. 1, c. 19.

<sup>(</sup>h) Stat. 1, c. 11.

<sup>(</sup>I) This was decided in 4 Edw. 6; but in Portman v. Willis, ubi sup. Gawdy was of opinion, against Popham and Clench, that a grant of omnia bona mobilia et immobilia, would pass leases for years; and so, he said, would a grant of omnia bona in general; for 39 H. 6, 35, was, that a man had rent for years, and granted omnia bona sua; and it was held that this rent passed; and he vouched 4 Hen. 4, as another authority, because an executor shall have an ejectione firma by the equity of the statute of 4 Ed. 3, de bonis asportatis.

On examination, it appears that the authorities cited by Gawdy do not apply. The grant was of omnia bona et catalla, tam viva quam morlua; and in the statute of 4 Edw. 3, the words biens et chateux are used.

indeed be objected, that terms for years were not then much in use; but allowing this, later acts place the point still more out of doubt.

Thus the 21st Hen. 8, c. 5, after directing how administration shall be granted in certain cases of the "goods" of intestates, contains a direction, that surety shall be taken of the administrators for the administration of the "goods, chattels and debts," which they should be authorized to minister(i).

In this statute, the word "goods" was used as synonymous to "goods, chattels and debts;" and the point seems to be placed beyond controversy by the same sense being attached to that word in a statute passed but a few years previously to that upon which the present question arises.

The statute to which I allude is the 22d and 23d Car. 2, c. 10, which, after giving power to commit administration of the "goods" of intestates, directs bonds to be taken, with a condition for (amongst other things) making an inventory of the "goods, chattels and credits" of the deceased; which words are used throughout the condition. In fact, the words "goods," "goods, chattels and credits," and "estate," have one and the same meaning attached to them throughout the statute(k).

(\*) It remains to remark, that Lord Hardwicke seems to have considered leaseholds as within the operation of the 16th section of the statute of frauds, and consequently as not bound until the delivery of the writ of execution to the sheriff.

For in Burdon v. Kennedy(l), his Lordship said, where an execution by elegit, or fieri facias is lodged in

<sup>(</sup>i) And see 43 Eliz. c. 8.

<sup>(</sup>k) And see 29 Car. 2, c. 3, s. 25.

<sup>(1) 3</sup> Atk. 739; and see Jeanes v. Wilkins, 1 Ves. 195; Forth v. Duke of Norfolk, 4 Madd. 503.

<sup>(\*203)</sup> 

a sheriff's hands, it binds goods from that time, except in the case of the Crown, and a leasehold estate is also affected from that time; and if the debtor, subsequent to this, makes an assignment of the leasehold estate, the judgment creditor need not bring a suit in ejectment to come at the leasehold estate, by setting aside the assignment, but may proceed at law to sell the term, and the vendee, who is generally a friend to the plaintiff, will be entitled at law to the possession, notwithstanding such assignment(I).

III. There is still another provision in the act of Charles 2. in favor of purchasers. It is enacted, that the day of the month and year of enrolment of recognizances shall be set down in the margin of the roll; and that no recognizance shall bind any lands, &c. in the hands of any purchaser, bona fide and for valuable consideration, but from the time of such enrolment(m).

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# (\*)SECTION V.

Of Protection from unregistered Deeds, &c.

By several acts of parliament, all deeds and wills concerning estates within the north(n), east(o), or west(p) ridings of the county of York; or within the town and

<sup>(</sup>m) 29 Cha. 2, c. 3, s. 18. (n) 8 Geo. 2, c. 6.

<sup>(</sup>o) 6 Anne, c. 35. (p) 2 & 3 Anne, c. 4; 5 Anne, c. 18.

<sup>(</sup>I) Note, if the judgment-creditor tamper with the sheriff to have the estate sold at an undervalue, equity will relieve against the sale. Gascoign v. Stut, 3 Cha. Rep. 32. See Dillon v. Byrn, Irish Term Rep. 600.

county of Kingston-upon-Hull(q); or within the county of Middlesex(r), are directed to be registered.

And it is enacted, that all such deeds shall be adjudged fraudulent and void against any subsequent purchaser, or mortgagee, for valuable consideration, unless a memorial thereof be registered in the manner thereby prescribed, before the registering of the memorial of the deed under which such subsequent purchaser or mortgagee shall claim.

And that all devises by will shall be adjudged fraudulent and void against subsequent purchasers or mortgagees, unless a memorial of such will be registered within the space of six months after the death of the devisor, or testatrix, dying within Great Britain; or within the space of three years after his or her death, dying upon the sea, or in parts beyond the seas. Wills registered within the time allowed by the act will prevail over even a prior registered conveyance; but no time is limited by the act within which a memorial of a will must be registered. It may therefore be registered at any time where there is no adverse title under a prior registered conveyance; and there is no weight in an objection which has lately been (\*)made, that the estate descends to the heir at law, if the will be not registered within the periods above specified.

This provision is the same in all the acts, but different provisions are made by the several acts in the case of wills contested or suppressed.

If the devisee of an estate within any of the three ridings of the county of York, or the town of Kingston-upon-Hull, be disabled to exhibit a memorial within the time limited, by the suppression of the will, or other inevitable difficulty, then a memorial entered of such impediment within six months after the death of such devisor or testatrix, who shall die within Great Britain, or

<sup>(</sup>q) 6 Anne, c. 35. (\*205)

within three years after the desease of such person who shall die upon the sea, or beyond the seas; and a memorial of such will, also registered within six months after the removal of such impediment, will protect the devisees against any purchaser subsequently to the will.

But as to the estates in the north riding of York, it is enacted, that in case of the concealment or suppression of any will or devise, any purchaser shall not be disturbed or defeated in his purchase, unless the will be actually registered within three years after the death of the devisor.

As to estates in the county of Middlesex, it is provided, that an entry of the impediment within two years after the death of any devisor or testatrix who shall die in Great Britain, or within four years after the decease of such person who shall die upon the sea or beyond the seas; and the registry of a memorial of the will within six months after the removal of the impediment, shall be good. But no concealed will is to affect a purchaser, unless it be registered within five years after the death of the testator.

None of the acts extend to copyhold estates, or to leases at rack-rents, or not exceeding twenty-one years, where (\*)the actual possession and occupation go along with the lease. And the act for the county of Middlesex does not extend to any of the chambers in Serjeants Inn, the Inns of Court, or Inns of Chancery.

And it is by the same acts further provided, that no judgment, statute or recognizance (other than such as shall be entered into in the name and upon the proper account of the king, his heirs and successors) shall bind any such estates as aforesaid, but only from the time that a memorial thereof shall be duly entered.

This clause is general as to estates in Middlesex; but as to estates in the east and west ridings of York and

Kingsten-upon-Hull, it is enacted, that the registry of judgments, statutes or recognizances within thirty days after the acknowledging or signing thereof, shall bind all the lands of the defendant at the time of such acknowledgment or signing; and the same provision is made as to estates in the north riding of York, only that the time is limited to twenty days.

In commenting on these important acts, I propose to consider, first, the memorial required by the acts; secondly, what instruments must be registered; thirdly, the exceptions in the acts; and fourthly, the equitable doctrine on these statutes in regard to notice.

- I. And first, every memoral of a deed or conveyance is directed by the acts to be under the hand and seal of some or one of the grantors or grantees, his or their heirs, executors or administrators, guardians or trustees, attested by two witnesses, one whereof to be one of the witnesses to the execution of the deed; which witness shall, upon his oath before the registrar, prove the signing and sealing of the memorial and the execution of the deed mentioned in such memorial.
- (\*)A line by mistake omitted in the act for the North Riding of York; the memorial is required to be attested "by two witnesses to the execution of such deed, which witness" is directed to prove the execution of the memorial and the deed. It is evident, that the words in the other acts "one whereof to be one of the witnesses" are omitted after the word "witnesses," and before the words "to the execution of such deed." By this act the person signing the memorial may acknowledge it, and the execution of the deed.

The intention of the Legislature clearly was, that no deed should be memorialized, the execution of which by the granting party was not proved on oath by one of the witnesses to it; for although the memorial may be exe
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cuted either by the grantor or grantee, yet one of the witnesses to it must be a witness to the execution of the deed, and this must be understood to mean not merely the execution by an unnecessary party, as the grantee, but the execution by the party from whom the estate moves.

It is however observed, in the Observations on Registry(s), that if a considerable time has elapsed from the date of a deed intended to be registered, and all the witnesses are dead, or the testimony of any of them not easily obtained, no further delay need originate from either cause; as the re-execution of such deed by any one of the parties in the presence of a new witness, will be sufficient to effectuate the registry.

Now there seems great reason to contend, that such a memorial would be wholly inoperative under the registering acts. A witness to the execution of a deed, which is intended to be registered, was required for the purpose of authenticating the original execution of it, and to prevent (\*) forged deeds from being put on the register(t). The requisition of the act is not even substantially complied with by an execution, which is totally inoperative, and which, if it had any operation, would be a fraud upon the revenue.

It seems that the direction in the act, by which the heirs, executors or administrators, guardians or trustees of some or one of the grantors or grantees, are authorized to execute the memorial, has been thought not to convey a very clear idea of the manner in which the registry by such representative is to be effected; and therefore the register requires the instrument to be registered, to be sealed and delivered by the person requiring the registry, as if he was a party in his own right (u).

<sup>(</sup>s) Rigge on Reg. p. 76, n. (d); Precedent, No. 32, p. 143.

<sup>(</sup>t) See Hobhouse v. Hamilton, 1 Scho. & Lef. 207.

But it seems quite clear, that no such execution is necessary. The representative need execute the memorial only in the presence of two witnesses, "one whereof to be one of the witnesses to the execution of such deed or conveyance," which witness will then, according to the very words of the act, prove the signing and sealing of the memorial, and the execution of the deed or conveyance mentioned in such memorial.

So it seems, that where a lease or any other deed is from a corporation, who of course affix merely a seal without any signature, the lessee is required to execute the deed for the conveniency of registry (x)(391).

This practice is open to the observation just made; for it is clear, upon principle as well as authority (y), that a corporation affixing their seal is tantamount to a signing and sealing by an individual. And it is to be observed, that in this and the preceding cases it is indispensably (\*)requisite that one of the witnesses to the original execution of the instrument intended to be memorialized should be a witness to the memorial.

It appears also, that the registrars are in the habit of receiving and registering certificates of writs of execution (z), decrees or orders from the courts of equity, or rules of the courts of law(a), office copies of wills(b), and certificates of the discharge of judgments(c), none of which are authorized to be registered, or can be legally received. And it therefore seems clear, that the registry of such instruments is wholly nugatory, so far as any priority or

(x) Rigge, 106, 107.

- (a) Id. 83, n. (h).
- (y) Doe v. Hogg, 1 New Rep. 306.
- (b) Id. 96, n. (s).

<sup>(</sup>z) Rigge, Precedent, 35, p. 148.

<sup>(</sup>c) Rigge, Precedent,87, n.

<sup>(391)</sup> See Jackson v. Walsh, 3 Johns. Rep. 228. See also, Taft v. Brewster, 9 Johns. Rep. 334. Colcock v. Garvey, 1 Nott & M'Cord, 231. Frankfort Bank v. Anderson, 3 Marsh. Ken. Rep. 1. Bank of Columbia v. Patterson's Admr., 7 Cranch, 299, 305.

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effect is attempted to be given to them by force of the act.

In regard to the contents of the memorial—the anxiety of the Legislature not wantonly to compel the disclosure of the concerns of individuals, induced them simply to require that every memorial should contain, first, the day of the month and year when the deed, &c. bears date, and the names and additions of all the parties to it, and of the devisor or testatrix of a will, and of all the witnesses to such deed, &c. and the places of their abode; and secondly, the honors, manors, lands, tenements and hereditaments contained in such deed, &c. and the names of the parishes, &c. where any such estates lie that are comprised in or affected by such deed, &c. in such manner as the same are expressed or mentioned in such deed, &c. or to the same effect(d). A memorial, therefore, to the following effect would fully comply with the requisitions of the act: "A memorial to be enrolled pursuant to act of parliament, of an indenture. It bears date the 14th day of June 1806. It is made between A., of, &c. [here insert the description], of the one part, and B., of, &c. (\*)[here insert the description], of the other part. It comprises all that manor, &c. [here insert the parcel; the general words need not be inserted, but, instead thereof, say, "with their rights, members and appurtenances." And the said indenture, as to the execution thereof by the said A. and B., is witnessed by C., of, &c. [here insert his description], and D., of, &c. [here insert his description]. And the said indenture is hereby required to be registered by the said B., as witness his hand and seal this 14th day of June 1806. Signed and sealed in the presence of C. or D. [one of them must attest the memorial], and E., of, &c." It seems, however, advisable to go a step farther, and to state to whom the estate is conveyed, as this,

<sup>(</sup>d) 7 Anne, c. 20, s. 6.

where there are more than two parties, will facilitate a search for incumbrances on the estate; but no good reason can be given why the parties should be put to expense by stating the instrument more fully. When a purchaser discovers what deeds were executed, he will of course require the production of them; and so no mischief can arise by a strict adherence to the letter of the act.

With respect to the parcels it is provided, that where there are more writings than one for making or perfecting any conveyance or security which concerns the same estates, it shall be a sufficient memorial thereof, if all the estates are only once named in the memorial of any one of the deeds or writings, and the dates of the rest of the deeds or writings, with the names and additions of the parties and witnesses, and the places of their abodes, are only set down in the memorials of the same, with a reference to the deed or writing whereof the memorial is so registered, that contains the parcels mentioned in all the deeds, and directions how to find the registering of the same(e).

This provision has been extended in practice. It is (\*)usual, for instance, in a memorial of an assignment of a lease, to refer for the parcels to the prior registry of the lease, although a separate and distinct transaction. This, however, is very incorrect. The statute only authorizes such a reference where several writings are executed to perfect the same conveyance or security. And where the memorial does not comply with the directions of the act, the person claiming under the deed defectively registered cannot insist on the benefit of the statute against a subsequent purchaser without notice, whose conveyance is duly registered.

II. We are to consider what deeds ought to be regis-

<sup>(</sup>e) 7 Anne, c. 20, s. 7.

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tered. It is not easy to conceive that any doubt could arise on this head; but, nevertheless, two questions have been agitated.

First, it has been contended, that a deed of appointment under a power need not be registered; because upon the execution of a power the interest limited by it arises under the deed creating the power. But to this it was answered, that the deed was within the mischief intended to be guarded against by the act, as a purchaser could not otherwise discover whether the power was exercised; and it was accordingly decreed, that deeds of appointment must be registered (f).

The other question was, whether the non-registry of a lease was cured by registering an assignment in which the lease was recited; and it was very properly decided, that it was not(g)(392); for the intention of the Legislature was, that the register should contain such information as might enable purchasers to ascertain whether estates were or were not subject to incumbrances; for which purpose it is necessary, that the register should contain a regular (\*)chain of title. If one link is broken, the object of the Legislature is defeated.

In Warburton v. Loveland(h), which depended upon the Irish act, a new question arose. An unmarried woman being possessed of land in Ireland for a long term of years, and about to marry, assigned the term by a deed, executed also by the intended husband, to trustees, upon trust to permit the husband, after marriage, to receive the rents for life; then the wife for life, then the

<sup>(</sup>f) Scrafton v. Quincey, 2 Ves. 413.

<sup>(</sup>g) Honeycomb v. Waldron, 2 Str. 1064.

<sup>(</sup>h) 2 Dow & Clark, 480. The observations of the Judges are so important, that they are stated at some length.

<sup>(392)</sup> See Jackson v. Neely, 10 Johns. Rep. 376. Correy's Les. v. Caxton, 4 Binn. 140.

first son of the marriage, if any, with remainder over. The marriage took effect; the husband entered into possession, and received the rents and profits, and then made a lease for years for part of the term, rendering rent; the lessees entered and received the rents and profits, and then assigned the lease for a valuable consideration. The marriage settlement was not registered; the lease by the husband was registered; the assignment of the lease was supposed not to have been registered. The wife, surviving her husband, obtain edpossession of the lands; the assignees of the lease brought an ejectment against her to recover the possession.

The questions were, 1st, which title is to be preferred, that of the assignees of the lease, or of the widow, or the

trustees under the settlement?

2d. Supposing the assignment of the lease not to have been registered, will the construction be the same?

Upon the first of these questions, the Judges who were summoned were of opinion that, regard being had to the true construction of the Irish Register Act, the title of the assignees of the lease, under the circumstances above stated, is to be preferred to that of the widow, and also to that of the trustees under the settlement; and upon the second question, they were of opinion, that, supposing (\*)the assignment of the lease not to have been registered, the construction of the statute remained the same, and the House of Lords decided accordingly. In delivering the opinion of the Judges, Tindall, C. J., observed, upon the facts of this case, Mr. Warburton, who granted the lease of 1800, was at the time of granting it in possession of the premises; and as the marriage settlement of 1779 was never put upon the register, he must have appeared to the public, and amongst the rest, to the lessees taking under the lease of 1800, to be in possession of the premises either in his own right or in right of his wife, in either of which cases he would have had (\*213)

the undoubted right to grant a valid term by the lease of 1800, unless the unregistered settlement of 1779 stood in the way. Now, it was not disputed on the part of the plaintiff in error, that if Mr. Warburton had been the party who conveyed the term by the unregistered settlement of 1779, and had afterwards made the lease which was registered, such lessees, being purchasers for a valuable consideration, might have availed themselves of the fifth section of the registry act, and that the prior settlement could have been held fraudulent and void as against the lease. Such a case was admitted to fall within the letter as well as the spirit of the act. But it was contended by the plaintiff in error, that the operation of the Irish Registry Act extended no further, but was confined to cases in which both the earlier and the subsequent conveyances are the deeds of the same grantor; and whether such was the case, or, on the contrary, the act extended to give a preference to the subsequent deed when registered against the prior unregistered deed, notwithstanding the same was executed by a former owner of the estate, was, in substance, the question now proposed for consideration. No case could be found either upon the English registry acts or upon the Irish act, in which this precise (\*)question had been decided by a court of law. It must, therefore, be determined upon principle, not upon authority; and the only principle of decision that was applicable to it, was the fair construction of the statute itself, to be made out by a careful examination of the terms in which it was framed, and by a reference in all cases where a doubt arises to the object which the Legislature had in view when the statute was passed. Where the language of the act was clear and explicit, they must give effect to it, whatever might be the consequences; for in that case the words of the statute spoke the intention of the Legislature. If in any case a doubt arose upon the words themselves, the Judges must endeavor to solve that \*214°

doubt, by discovering the object which the Legislature intended to accomplish by passing the act. After examining the provisions of the act, the learned Judge concluded that the statute meant to afford an effectual remedy against the mischief arising to purchasers for a valuable consideration, from the subsequent discovery of secret or concealed conveyances, or secret or concealed charges upon the estate. Now, it was obvious that no more effectual remedy could be devised than by requiring that every deed by which any interests in lands or tenements was transferred, or any charge created thereon, should be put upon the register under the peril, that if it was not found thereon, the subsequent purchaser for a valuable consideration, and without notice, should gain the priority over the former conveyance by the earlier registration of

his subsequent deed.

The mischief to the purchasers was the same whether the secret conveyance or charge arose from the deed of his immediate grantor, or that of a former owner of the estate. If the words of the statute will comprehend both, why was he to be protected against a secret deed in the one case, and not in the other? What just ground (\*)of complaint could be urged against such a construction by the grantee under the unregistered deed executed by a former owner of the estate? The deed, if it was a real and a bona fide transaction, must have been, or ought to have been, in his custody or power from the time of its delivery. What cause could be assigned for its nonappearance upon the register, except either collusion with the grantor, or carelessness and neglect in himself, or mere accident? In neither case would he complain of the construction of the statute by which his own fraud, or his own want of due caution, or an accident which befel himself, was not allowed to operate to the prejudice of the rights of the more diligent purchaser. Suppose a man to settle his property upon his youngest son's (\*215)

marriage, on himself for life, remainder to his eldest son for life, remainder to the younger son, his wife and children, in strict settlement; remainder over in fee; the settlement is not registered, and the settler dies, his eldest son enters, and supposing himself to have the fee conveys to a purchaser for a valuable consideration, shall it be allowed that the younger son, his widow or his children, shall enter and evict the purchaser? Or suppose a like settlement and a like concealment, and the father devises all his lands in trust to sell, and to apply the money to debts and portions, or other purposes: after the estate is sold, and the money distributed, can the construction of this act be such that the purchaser shall be turned out by the claimants under this settlement? Or, in the particular case then before them, where Mrs. Warburton before her marriage might have registered the deed, and the trustees after the marriage were bound in duty to do so if the settlement came to their knowledge, could the proper construction of the act allow Mrs. Warburton to avail herself of her own carelessness or of the breach of duty of her trustees, by (\*)establishing her unregistered deed against a registered lease made by her husband, upon no other ground than that the settlement and the lease were not conveyances by the same person? If there was no provision in the act to prevent this inconvenience, it must be submitted to through necessity; but if there were words in the act capable of such an interpretation as would prevent the inconvenience, they thought themselves bound upon every consideration to give them such an effect. How much more then where the words themselves and their strict grammatical construction appeared to require such a sense? That in all the cases above supposed a great injustice would be worked if the act supplied no remedy, no one can deny; to allow the act to authorize such mischief, would not only be injustice, but would be

against law. The language of the act throughout, seemed to establish this to have been its leading object, that as far as deeds were concerned the register should give complete information, and that any necessity of looking further for deeds than into the register itself should be superseded; and it was manifest that no construction of the act was so well calculated to carry into effect this its avowed object as that which forced all transfers and dispositions of every kind, and by whomsoever made, to be put upon the face of the register so as to be open to the inspection of all parties who might at any time claim an interest therein.

It had been further argued that the effect of the marriage settlement was to prevent the husband from having any right to grant the lease of 1800 at the time it was made, for that the wife's right was effectually conveyed as between her husband and herself by the deed of 1779; that she had no interest in her at the time she married; that she could therefore pass no interest to her husband by the marriage; that the husband (\*)consequently never had any right, and therefore could convey none to the lessee. Now, it might be admitted that as against the husband, who was party to the deed of 1779, that deed was valid; it might be admitted also that he could not of right exercise any power over the property inconsistent with that deed; but as by the nonregistration of that deed the grantees suffered him, as to the world at large, to have the appearance of right, neither they, nor any claiming under them, were at liberty to set up the deed in opposition to the persons who had been deluded by the appearance of right in the husband. This argument, therefore, which would be good against the husband himself, could not be heard from the parties claiming under the settlement against his grantee for a valuable consideration.

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III. We come to the exceptions in the acts.

The first exception is of copyhold estates. This exception is general; and it may be thought that no deed relating to a copyhold estate need be registered. No effectual lien can be created on the land without its appearing on the court-rolls. A lease, indeed, once created by license is a common-law interest, and may be assigned without the assignment appearing in the court books; but this is a very inconsiderable mischief, as the license must appear on the court-rolls. Indeed, in some few manors, copyhold tenants may lease without license, and this is a good custom. But still in all cases, although the interest granted by the lease is a common-law interest, yet the estate remains copyhold, and appears to be within the exception in the act. However, it is certainly advisable to register such leases of copyhold estates as, if the estate were freehold, would require registry.

(\*) The next exception is of leases at rack-rent. It frequently happens, that a lease originally at rack-rent becomes of some value in the course of a few years. When the lease is sold for a valuable consideration, the question arises, whether it continues within the exception, or ought to be registered(i). On the one side it may be urged, that the property being valuable, the lease is within the spirit of the statutes, as a purchaser of it might otherwise be defeated by a prior secret assignment. But, on the other hand, it may be said, that the next exception shows the Legislature did not intend every species of property to be subject to the acts, although it may be a saleable interest. And it may be insisted, that the lease, at the time it was granted, having been within the exception, cannot be effected by any matter ex post facto, for then one day it may be within the exception, and another it may be subject to the directions of the act, just as the

property may rise or fall in value. Perhaps, therefore, the better opinion is, that a lease originally at rack-rent, and within the exception in the acts, continues so during the term, although it may become a valuable and saleable interest.

The next exception is of leases not exceeding twentyone years, where the actual possession and occupation go along with the lease. And it has been said, that where such a lease becomes assigned for a valuable consideration, its registry ought always to be recommended, and particularly when such assignment is by way of mortgage, for then it is clearly out of the exemption, the possession and occupation (mentioned conjunctively) being divided(i). The latter part of this observation is correct; and it is always usual in practice to require a beneficial (\*)lease, not exceeding twenty-one years, to be registered where it is assigned by way of mortgage. And, indeed, the acts seem cautiously worded, so as not to exempt the lease in that event. But it is impossible to contend, that the assignment of the lease for a valuable consideration can take it out of the exception. It still remains clearly within, as well the spirit as the words of the exception. While the possession and occupation go along with the lease no one can be deceived, and the lease still continues "a lease not exceeding twenty-one years, where the possession and occupation go along with the lease."

The last exception requiring notice is of the chambers in Serjeants Inn, which is certainly within the city; and it therefore seems to have been doubted, whether the Legislature did not intend the act of 7 Anne to include in its operation the whole metropolis, except the borough of Southwark(k). But there is not the least ground for this doubt. It is not surprising that the mistake should have been made, and it is impossible to argue, that such an

<sup>(</sup>j) Ib. 88, n. (o). (k) Rigge, 88, n. (p). (\*219)

error shall make an act passed relating to lands "in the county of Middlesex," upon the petition of the "justices of the peace, and grand jury of the county of Middlesex," extend to the city of London. This construction would invalidate some thousands of leases, as the general opinion of the Profession is, that the act does not extend to the city.

IV. The fourth division of this subject remains to be discussed. The questions on this head are simply three, viz.

First, Whether a person having the legal estate, as a mortgagee, and advancing more money without notice of a second mortgage duly registered, shall hold against the second mortgage till he is satisfied all the money he (\*)has advanced? And it hath been adjudged that he shall(l)(l)(394).

The decision was made upon this ground: that though the statute avoids deeds not registered, as against purchasers, yet it gives no greater efficacy to deeds that are registered than they had before; and the constant rule of equity is, that if a first mortgagee lends a further sum of money without notice of the second mortgage, his whole

(1) Bedford v. Backhouse, 2 Eq. Ca. Abr. 615, pl. 12; 2 Kel. in Cha. 5; Wrightson v. Hudson, 2 Eq. Ca. Abr. 609, pl. 7.

<sup>(</sup>I) Lord Redesdale has determined differently on the Irish registering act, because the act declares that every deed shall be effectual according to the priority of the time of registry. There appears to have been considerable difficulty in the way of this decision. Bushell v. Bushell, Latouche v. Lord Dunsany, 1 Scho. & Lef. 90, 137.

<sup>(394)</sup> See Berry v. Mutual Ins. Co. 2 Johns. Ch. Rep. 603. Johnson v. Stagg, 2 Johns. Rep. 510. Evans v. Jones, 1 Yeates, 174.; and see Shirras v. Caig, 7 Cranch, 34, 50. Colquhoun v. Atkinsons, 6 Munf. 550. Huges v. Worley, 1 Bibb, 290. Hendricks v. Robinson, 2 Johns. Ch. Rep. 309. Brinkerhoff v. Marvin, 5 Johns. Ch. Rep. 326. Jarvis v. Rogers, 15 Mass. Rep. 389, 397. James v. Johnson, 6 Johns. Ch. Rep. 428. ct seq.

money shall be paid in the first place. By the establishment of the register, the second mortgagee has the best possible means of discovering whether the estate is incumbered, and who the incumbrancer is; and if he has not searched the register, or, having searched the register, has neglected, in compliance with the general rule of equity to give the prior incumbrancer notice of the second mortgage, he is not considered a proper object for the extraordinary protection of a court of equity; for even the rule of law is vigilantibus non dormientibus servat lex.

This principle extends to a mortgagor paying off mortgage-money to a mortgagee, without notice of his having transferred the mortgage, which is a valid payment, although the transfer of the mortgage is duly registered(m)(395).

And it is conceived, that the rule would apply to a mortgagee lending a further sum of money to the mortgagor, without notice of the sale of the equity of redemption; and therefore a purchaser of an equity of redemption (\*) of an estate should, immediately after the sale, give notice of it to the mortgagee, although the estate is in a register county, and his conveyance is duly registered. Indeed a purchase of an equity of redemption should never be completed without the concurrence of the mortgagee, for if the mortgagee have another mortgage made to him by the seller, although of a distinct estate for a distinct debt, yet the purchaser of one estate cannot redeem one mortgage without redeeming the other (n)(396).

And here it may be remarked, that an assignment should not in any case be taken of a mortgage without

<sup>(</sup>m) Williams v. Sorrell, 4 Ves. jun. 389.

<sup>(</sup>n) Ireson v. Denn, 2 Cox, 425.

<sup>(395)</sup> See James v. Johnson, 6 Johns. Ch. Rep. 417.

<sup>(396)</sup> See Phelps v. Ellsworth, 3 Day, 397, 401.

<sup>(\*221)</sup> 

the privity of the mortgagor as to the sum really due; for although it undoubtedly is not necessary to give notice to the mortgagor that the mortgage has been assigned (o), yet the assignee takes subject to the account between the mortgagor and mortgagee, although no receipt be endorsed on the mortgage-deed for any part of the mortgage-money which has been actually paid off (p)(397).

The second question is, Whether a person purchasing without notice, and obtaining the legal estate, shall be prejudiced by a prior equitable incumbrance, which was duly registered previously to his purchase? It was decided by Lord Camden, in the case of Morecock v. Dickens(q), that he shall not(398); and Lord Redesdale has expressed his opinion to be, that the registry of an equitable incumbrance is not notice to any subsequent purchaser. His Lordship admitted, that if a man searches the register, he will be deemed to have notice, and that no person thinks of purchasing an estate without searching the registry; but he thought it could not be considered (\*) as notice to all intents, on account of the mischiefs that would arise from such a decision. For if it is taken as constructive notice, it must be taken as notice of every thing that is contained in the memorial: if the memorial contains a recital of another instrument, it is notice of that instrument; if a fact, it is notice of that fact(r). So, if it be notice, it must be notice whether the deed be duly

<sup>(</sup>o) See 9 Ves. jun. 410.

<sup>(</sup>p) Matthews v. Wallwyn, 4 Ves. jun. 118. See 9 Ves. jun. 264.

<sup>(</sup>q) Ambl. 678.

<sup>(</sup>r) Bushell v. Bushell, 1 Scho. & Lef. 103; and see Pentland v. Stokes, 2 Ball & Beatty, 68.

<sup>(397)</sup> See Clute v. Robison, on appeal, 2 Johns. Rep. 595, 612.

<sup>(398)</sup> See Parkist v. Alexander, 1 Johns. Ch. Rep. 398, 399, 400.

registered or not; it may be unduly registered, and if it be so, the act does not give it a preference; and thus this construction would avoid all the provisions in the act for complying with its requisites(s)(399).

The third and last question is, Whether a person buying an estate with notice of a prior incumbrance not registered shall in equity be bound by such incumbrance, although he hath at law obtained a priority by registering his deed? And it hath been holden that he shall(t)(400).

This decision is consistent with the general principles of equity. The intention of the act was to secure subsequent purchasers and mortgagees against prior secret conveyances and fraudulent incumbrances; and, therefore,

- (s) Latouche v. Lord Dunsany, 1 Scho. & Lef. 157; and see Underwood v. Lord Courtown, 2 Scho. & Lef. 64.
- (t) Lord Forbes v. Deniston, 4 Bro. P. C. 189; 2 Eq. Ca. Abr. 482, pl. 19; 3 Atk. 653, cited; Chivall v. Nicholls, Str. 664; Beatniff v. Smith, 1 Eq. Ca. Abr. 357, pl. 11; Blades v. Blades, 1 Eq. Ca. Abr. 358, pl. 12; Hine v. Dodd, 2 Atk. 275; Le Neve v. Le Neve, 3 Atk. 646; Sheldon v. Cox, Ambl. 624; and Jolland v. Stainbridge, 3 Ves. jun. 478; and see Cowp. 712; 1 Burr. 474; 1 Scho. & Lef. Rep. 102; Biddulph v. St. John, 2 Scho. & Lef. 521; Eyre v. Dolphin, 2 Ball & Beaf. 290.

<sup>(399)</sup> See Heister's Les. v. Fortner, 2 Binn. 40, 44. Hodgson v. Butts, 3 Cranch, 155. Simon's Les. v. Brown, 3 Yeates, 187. Moore's Exr. v. The Auditor, 3 Hen. & Munf. 232. Frost v. Beckman, 1 Johns. Rep. 288, 300.

<sup>(400)</sup> See Berry v. Mutual Ins. Co., 2 Johns. Ch. Rep. 603, 607, ct seq. Jackson v. Sharp, 9 Johns. Rep. 162, 168. Jackson v. Burgott, 10 Johns. Rep. 457, 460, ct seq. Lambert v. Nancy, 2 Munf. 196. Blair v. Owles, 1 Munf. 38. Hoover v. Donally, 3 Hen. & Munf. 316. Roberts v. Staunton, 2 Munf. 129, 135. Farnsworth v. Childs, 4 Mass. Rep. 637, 639. Marshall v. Fisk, 6 Mass. Rep. 24, 30. Stroud v. Lockart, 4 Dall. 153. Henry's Les. v. Morgan, 2 Binn. 497, 501. Dey v. Dunham, 2 Johns. Ch. Rep. 182. S. C. on aooeal, 15 Johns. Rep. 555.

where a person has notice of a prior conveyance, it is not a secret conveyance by which he can be prejudiced; for he can be in no danger where he knows of another incumbrance; (\*)because he might then have stopped his hand from proceeding, and therefore is not a person whom the statutes meant to relieve(u)(401). But of course notice of a prior unregistered instrument is unimportant at law. The first registered instrument must prevail at law(x)(402).

It will occur to the learned reader, that although the prior purchaser would, in a case of this nature, be relieved against the subsequent sale, yet the legal estate will be vested in the subsequent purchaser by force of the statute.

From the foregoing decisions, it is evident that a purchaser may be bound by a judgment(y) or a deed, although not registered; but it is equally clear, that it must be satisfactorily proved that the person who registers the subsequent deed must have known exactly the situations of the persons having the prior deed; and knowing that registered, in order to defraud them of that title he knew at the time was in them(z)(403). Apparent fraud,

- (u) Le Neve, 3 Atk. 646.
- (x) Tunstall v. Trappes, 3 Sim. 301.
- (y) Doe v. Allsop, 5 Barn. & Ald. 142.
- (z) See 3 Ves. jun. 485.

<sup>(401)</sup> See Frost v. Beekman, 1 Johns. Ch. Rep. 288, 301.

<sup>(402)</sup> Roberts v. Stanton, 2 Munf. 129. Jackson v. Burgott, 10 Johns. Rep. 457, 462. Jackson v. Hubbard, 1 Caines' Rep. 82. Jackson v. Given, 8 Johns. Rep. 105, 2d edit.

<sup>(403)</sup> See Norcross v. Widgery, 2 Mass. Rep. 506.

<sup>&</sup>quot;A person who takes a conveyance of land, with the knowledge that the grantor had previously conveyed it to another, cannot hold it against the first purchaser, even though the first conveyance is not recorded. It would be fraudulent in him to attempt thus to deprive the purchaser of the fruits of his contract. If the grantor can be considered as having any title or estate after the first conveyance, it is merely the legal

or clear and undoubted notice, would be a proper ground of relief; but suspicion of notice, though a strong suspi-

estate, which he holds in trust for the first purchaser; and the second purchasing with knowledge of the trust, shall hold subject to the same trust. But if the second purchaser procures his deed to be recorded before the other, and then sells the land bona fide, and for a valuable consideration, to a person wholly ignorant of those circumstances, the latter will hold the land against the first purchaser. If this were not so, our laws, which require the registering of deeds, would be useless, if not worse: because a purchaser, after the most thorough examination in the registry of deeds, and finding a succession of conveyances, all in legal form and in perfect order, might still be evicted upon proof of a secret trust, or a fraud, on the part of some former owner. Per Jackson, J. in The State of Connecticut v. Bradish, 14 Mass. R. 296, where the demandants sued a writ of entry sur disseizin; and gave in evidence a mortgage dated Feb. 1802, and which was duly recorded; and also another mortgage, executed in 1807 to secure the same debt; but not recorded until 1808. It appeared that Thurber, who executed the last mortgage, subsequently executed a mortgage to the Dwights; and this last mortgage was executed and recorded before the recording of the previous mortgage. Seven days after the Dwights assigned their mortgage to the defendant; and which was afterwards recorded. appeared that the Dwights knew of the previous mortgage when they received their deed. The jury were instructed accordingly that the demandants were entitled to a verdict; for the tenant was in no better condition than the Dwights. The Court granted a new trial; and Jackson, J. observed-" if the money expressed in the notes is due and payable to Bradish by virtue of the assignment, the question, whether he shall hold the land as security for that money, must be decided like any other question, relating to the same land. Walley v. Walley & al. in 1 Vern. 484, was cited in the argument and is cited by Powell on Mortgages, as showing that the assignee of a mortgage will be affected by notice to the assignor, of an outstanding title to the land mortgaged, and will take subject to that title. - The case furnishes no authority to that point. The assignee there had actual notice. If from legal evidence the jury should find that Bradish did know the fact of the previous mortgage, his title would be void as against the demandants: or rather his mortgage would be postponed to theirs. But we certainly cannot say that he shall be presumed from the circumstance that the demandant's deed was registered before the assignment to Bradish, although after the conveyance to the Dwights, to know of the prior conveyance. When a purchaser is examining his title in the registry

## cion, is not sufficient to justify the Court in breaking in

of deeds, and finds a good conveyance to his grantor, he is not expected to look further. Bradish it is true had only to look to the registry for the next day, and perhaps only to the next page, to discover this prior conveyance to the demandants. But he is not required to look one day or one page beyond.

The case of Trull v. Bigelow, 16 Mass. 406, where, although the demandant when he took his deed from Judd, knew that Judd's grantor, Caldwell, had knowledge of the conveyance to Bosworth; which preceded his in point of time: and the question was, whether the knowledge of this fact alone would defeat the estate in his hands, which was valid in the hands of Judd? "Had the demandant with the knowledge of the facts, purchased directly of Caldwell, he would have taken nothing by his deed. But the estate was in Judd indefeasible, except by his own act: Bosworth had lost all right by omitting to register his deed. The demandant knows the title was once defective, in one of the persons under whom he claims; but he also knows that the defect was cured, and the stain upon the title effaced. He is a bona fide purchaser of him who had an unimpeachable title; and he must have judgment."

There is not a single case, at law or equity, where a bona fide purchaser has been deprived of his title by the proof of fraud practised by his grantor upon the person of whom he purchased; unless it be 1 Conn. R. 527. Per Parker, C. J. in Somes v. Brewer, 2 Pick. R. 184. The demandant in this case made an assignment of a mortgage to one Skinner, who entered into possession; and subsequently assigned the mortgaged estate to the defendant. Somes also conveyed another tract of land to Skinner. But the ground upon which the demandant rested his argument was, that the deeds from Somes to Skinner were absolutely void. The Chief Justice observed, Upon the most careful examination of the cases cited by the demandant's counsel, I do not perceive, that, in any instance, a deed of a party competent to contract has been deemed void or a nullity on account of its being obtained by the fraud or imposition of the grantee. Such a deed passes the estate, and is only voidable by showing under a special plea the circumstances which go to defeat it. In the only case to be found in our own reports, in relation to the effect of fraud upon deeds, (Bliss v. Thompson, 4 Mass. 492), Chief Justice Parsons, with his usual accuracy and precision, says, "It is generally true that a man shall not be received to aver against his own deed. But the case of fraud is always an exception, which vitiates every transaction; and a deed obtained by fraud is to be considered as a void contract as to the fraudulent party." This has always been understood to be the law in regard to fraudulent conveyances, both of real and personal estate, viz. that deeds made to defraud or delay creditors, are void as against such creditors; but are nevertheless good between the grantor and grantee and persons claiming under them, other than creditors, and will supnort a title in a purchaser of such fraudulent grantee, for valuable consideration, without notice. The case of Preston v. Crofat, (1 Conn. R. 527, note), in which the absolute nullity of deeds fraudulent against creditors, even as against a bona fide purchaser from the fraudulent grantee, without notice, is maintained by a majority of the judges; and their opinion is approved and sanctioned by Mr. Chancellor Kent. Still as their decision runs counter to all our practical notions and to many judicial decisions in this state; as it was combated with great force by a very eminent member of the Connecticut bench; and as the decree of the Chancellor of New-York was reversed in the Court of Errors; we cannot think it will be adopted beyond the jurisdiction of Connecticut. The point was settled before Parsons, C. J. in the case of Sutton v. Lord, 1 Dane's Abr. 631. Pothier, in his treatise on obligations, says, " when a party has been drawn into a contract by the fraud of another, the contract is not absolutely and essentially null because a consent, although obtained by surprise, is nevertheless a consers; but the contract is vicious, and the party who has been surprised, may cause it to be rescinded, because it is against the good faith which ought to regulate contracts." Poth. on Oblig. Pt. 1. c. 1, s. 1, art. 3, no. 29.

Brown on Sales, 396, states the Scotch law to be the same in regard to fraud; "and although in a question between the vendor and the vendee, such a contract may be set aside, and restitution given on the head of fraud, yet, until the contract is so set aside, the vendee, having the property of the subject vested in him by delivery, upon a habile (defeasible) title, is able to transfer the property to another; and therefore a second sale, made by him to a bona fide purchaser, will be effectual, and his fraud cannot be made the title of such a purchaser." " The grand distinction taken, is between the case of a sale by consent of the vendor, though unlawfully obtained, and an apparent sale by means of violence, such as theft or forgery, in which case there is no consent of any kind; and it is held, that a sale resulting from the act and consent of the vendor conveys a title, which is defeasible only while the thing remains in the hands of the vendee. And the learned Chief Justice added, "The English law is undoubtedly the same, though as such cases are generally disposed of in Chancery, there are not many decisions to be found in the reports of the common law." He cites Parker v. Patrick, 5 Term 175. Baron Gilbert's History and Practice of the High Court of Chancery, p. 287.

Marshall, C. J. in Fletcher v. Peck, 6 Cranch, 133, is to the same point.

"The case of a forged deed set up as the basis of a title, or the deed of an unlettered person to whom it was not read, or was read wrong by fraud, may be different in principle from the case we have been considering, (Homes v. Brewer, supra.) the law perhaps deeming acts like these as having no effect at all upon the rights of the parties. But the man who voluntarily signs and seals a deed knowing its contents, though cheated into the act, may choose, nevertheless, to let the deed stand; and if he does until an honest purchaser contiding in his act, and who is never apprized by him of any defect, pays his price and enters into possession, all the principles of justice forbid him from avoiding the title." (Parker, C. J. 2 Pick. p. 204.)

In Anderson v. Roberts, 14 Johns. 515, the Court thinks the case in Connecticut was decided on the peculiar structure of the statute in that state. He observed, p. 522, "I must be understood, as qualifying the right of the purchaser from the fraudulent vendee: it must be prior, in point of time, to a sale for a valuable consideration, by the fraudulent grantor; and it must, also, be prior to a sale on execution, at the suit of the creditor." Although, in Jackson v. Tracy, the sale under the judgment was prior to the deed from the fraudulent grantee, yet, in that case, the registry of the latter deed first took place, and the transaction happened in a county where deeds are required to be registered.

Where a creditor on the 18th December, 1820, made an attachment, he then knowing that a conveyance had been made on the 11th of the same month: it was held, that the effect is the same, under the construction which has been given to the statute, in relation to such creditor, as it would be in relation to a second purchaser under like circumstances. "Nothing was wanting to make good the title under the conveyance against all the world, but public notice of the very fact of which he had personal knowledge." Priest v. Rice, 1 Pick. 164. S. P. 4 Mass. 641; 6 ib. 487; 10 ib. 60; 11 ib. 158.

But to determine what notice is sufficient of a prior registry is more difficult. Generally an open possession of the first purchaser will raise a legal presumption of notice. The notice of an unregistered deed, must be a necessary inference from facts proved. M'Mechan v. Griffing, 3 ib. 149.

The same principle does not apply in the case of a prior attachment as in the case of a prior unrecorded deed; for "all creditors who are in pursuit of satisfaction of their debts by means of attachment, are considered as running a race on equal ground, and each is entitled to take advantage of defects in the proceedings of the others." Cushing

upon an act of parliament(a)(404). A lis pendens is not deemed notice for that purpose(b)(405).

I have brought to a conclusion the observations which I proposed to offer on the registering acts. If I might be allowed to express a general opinion on the provisions in these acts, explained as they are by the decided cases, I should be tempted to observe that they might be im-

- (a) See 2 Atk. 276; and Irons v. Kidwell, 1 Ves. 69, cited Wyat v. Burwell, 19 Ves. jun. 435.
  - (b) 19 Ves. jun. 439.

v. Hurd, 4 Pick. 253; 5 M'Gregor v. Brown, 170. The doctrine of constructive notice is denied by Lord Redesdale in Bushell v. Bushell, 1 Scho. & Lef. 90, but his decision rests on the construction of the Irish registry acts, which differ from those of England, and from ours. He denies that searching the records is conclusive notice. But in Shaw v. Poor, 6 Pick. 86, where a deed executed by two was acknowledged only by one, the registry was held to be sufficient: and it makes no difference in this respect whether the grantors were seised as tenants in common of the whole land conveyed, or are separately seised of distinct parts. The case of Heister v. Fortner, 2 Binn. 40, was different; the question there arose on a deed which had not been regularly recorded; the publicity required by statute had not been given; and no one was bound to take notice of a deed defectively proved, and not regularly registered.

A bond and deed executed separately but amounting to a mortgage, the recording the mortgage alone, may be sufficient, if the purchaser or creditor knows it to be a mortgage. "By the record the title was in the judgment debtor; the bond was in the pocket of the grantor: the knowledge that a bond was given by the grantee to the grantor, without any knowledge of its effect, would be no proof of fraud in a subsequent purchaser or attaching creditor." To be effectual notice, it must be known to constitute a mortgage, Newhall v. Burt, et al. 7 Pick. 157.

(404) See Dey v. Dunham, 2 Johns. Ch. Rep. 182, 190. S. C. on appeal, 15 Johns. Rep. 555. Taylor v. Heriot, 4 Des. 227, 238, 239.

(405) As to the question whether a lis pendens, in chancery, shall be deemed notice to a subsequent purchaser, or not, see Murray v. Ballou, 1 Johns. Ch. Rep. 566. Murray v. Lylburn, 2 Johns. Ch. Rep. 441. Murray v. Finster, 2 Johns. Ch. Rep. 155, 158. Green v. Slayter, 4 Johns. Ch. Rep. 38.

proved. I approve rather of the act for Ireland, though not to the extent to which it has been carried by the (\*)decisions of Lord Redesdale. I would by no means give an equitable charge the effect of a legal conveyance by the mere act of registry; at the same time that I would insure the priority of the charge as an equitable charge, by making the registry of an instrument notice to all subsequent purchasers. The rule, that notice of an unregistered incumbrance shall affect the conscience of a subsequent purchaser, I would not disturb, contemplating the present temper of the Courts to confine this doctrine to cases of clear notice.

V. I cannot now dismiss this subject without offering a few cursory observations on the bill which the House of Commons rejected for establishing a general register, as fresh attempts will no doubt be made to carry that measure. I may premise, that if such a bill passes, it will form an addition to this work, but will not call for any alteration of the law in the text, inasmuch as its provisions will be prospective, and will leave titles in register counties to depend for the time past upon the law as it now stands.

It should be borne in mind, that the establishment of a register upon the best plan that could be devised, would not relieve the present titles. To preserve them, the present legal estates must be retained and the present registers resorted to. Some rules should be introduced to relieve titles as they now stand:—1. the representation to terms of years should be facilitated; 2. the liens acquired by judgments, &c. should be regulated or removed as against bona fide purchasers; for example, it might be required, in order to bind a purchaser, that the description of the person against whom a judgment is to operate should be entered up; 3. the law of priorities as between mortgagees should be altered; 4. the doctrine of notice should be restrained; and,

lastly, all the present registers, including judgments, &c. (\*)should be revised and rendered accessible and useful. Such alterations would assist titles as they now stand, and future purchasers under them. A new register would not operate beneficially on titles for many years to come. There is therefore no hurry. And a general measure should follow, and not precede or include the proposed alterations. The present expense in regard to titles is, in forty-nine cases out of fifty, superfluous; but as every one may be in danger, all are guarded against it. This precaution has very much increased within the last thirty years, but not from any increased danger.

The present registers have led to much litigation, and have occasioned great expense. In one case, in Ireland, the costs of a search were enormous; in several instances in both countries they amounted to 40l. or 50l. The officers themselves admit that even their searches were frequently insufficient, and that they missed registered documents. Probably not one-twentieth part of the searches is effectual, or could be safely relied upon. Great numbers of instruments have been registered in a manner directly contrary to the provisions of the acts, and therefore ineffectually in law. The slightest mistake may be fatal. If a man's name be Crompton, and it is written Compton in the register, he would lose his estate in a competition with another, although later claimant, in whose registry there was no error.

The proposed system is a complicated one. It is often almost impossible to ascertain, after a deliberate consideration of the deeds, under which of several titles an estate is held; and a mistake in that particular, or a fraud committed by the seller or mortgagor, would defeat the title. Great difficulty will arise from the necessity of opening new titles with new symbols, connected with the old ones. No one will take the trouble to make these (\*)what they should be, with a view to future purchasers. (\*225) (\*226)

Every one will content himself with such an entry as he thinks will secure his own title. The officers cannot be depended upon. The trouble will be immediate, and the danger altogether remote and problematical.

The index merely refers to the deed; so that recourse must always be had to a copy of the deed, particularly for the parcels. In how many cases, from lassitude or want of ability, will the search be improperly conducted? After some lapse of time, it will require considerable legal ability to make a perfect search; and by and by, every man must resort to the registry for copies of his deeds. The system of symbols cannot be carried throughout: therefore there must be two systems and many indexes, at least four.

- 1. General documents, which may be mixed up with other classes and other symbols.
  - 2. Wills, alphabetically.
  - 3. Commissions of bankrupt, alphabetically.
- 4. Judgments and Crown debts, in the same manner. And all the deeds must be referred to and read. The purchaser will be answerable for a registry under the proper symbol; and if he make, a mistake in the root of his title, or be deceived in it, he will lose his estate. Should a purchaser be exposed to such a hazard? Great knowledge and care are requisite in the officers, and that in all times cannot be depended upon. The term symbol has been withdrawn, but the system has not been altered.

The greater number of frauds is committed in the sale to different persons of a reversionary interest in stock, but no provision is made for registering instruments affecting such property.

Disclosure is now considered as highly desirable; but in the early consideration of the subject the Report (\*)itself suggested a mode of avoiding a disclosure by vesting the *estate* in a trustee as *owner*, and taking a separate deed of trust from him not registered. And the Report said, that in many cases, such as that of an appointment of a reversionary interest, or of portions in favor of children, the registration might be safely delayed; so that secret trusts were to be resorted to, and one title appear on the register, and another off it. If appointments should be withheld from the register, a man might buy a child's portion, as in default of appointment, or the estate as not charged with portions, although the child's interest might have been varied or defeated, or the estate burthened with heavy portions. The register would not be a safe guide.

In order to render the register effectual, it was in the first instance proposed, that the operation of general words in the parcels should be cut down; but this was a violent method of giving an effect to the registry, which would not have been endured. Alterations in these respects have been made, to remove the objections to the system, but they are inherent in it.

The expense to which a register may lead, is proved by the evidence of Messrs. Wimburn and Collett, who sent a clerk down to York to search the register, and remain there searching from day to day until the transaction was closed. The establishment of one register for all England and Wales would lead to many journeys to the metropolis, at the expense of purchasers.

The only ground upon which a general registry can be supported is the safety of honest purchasers. But frequently by the negligence of agents, attornies, clerks, sometimes by frauds, even for the value of the fees which have often been charged, although the deeds have not been registered; and at times by the negligence, delay, or want of skill of the officers, or by oversights from which (\*)the most vigilant are not always exempt, heavy losses have, under such a protective measure, fallen on bona fide (\*228)

purchasers, who have themselves been diligent. The class, therefore, to that extent, are sufferers. It is in vain to hope that the registry will save the class from an equal degree of loss by protecting them against concealed incumbrances to the same amount, for ignorance, sloth, accident, petty frauds, are more likely to occur than a great and direct fraud on a purchaser or mortgagee by suppressing an incumbrance, and yet the slightest inattention or accident may be more fatal to a purchaser, with the benefit of the Act of Parliament, than the vilest fraud without that protection. No law can impart activity and intelligence to idle and ignorant persons, and many have been ruined without any neglect of their own, by the operation of the register acts.

The Committee of the House of Commons thought that if it were made the law of the land that registration of the conveyance should be as essential to the safety of the purchaser as enrolment now is to the validity of a bargain and sale, men would shape their course accordingly. It was not, they said, to be presumed, that the performance of so essential an act would be neglected in the one case more than the other. In making these remarks, the Committee were of course not aware that the instances are numberless in which bargains and sales have not been enrolled, although they become inoperative if not enrolled within six months; and in very many cases the validity of recoveries depends upon the enrolment. Hundreds of new recoveries have been suffered at a vast expense in consequences of the neglect to enrol bargains and sales, making the tenant to the præcipe.

This question must be looked at as one of profit and loss to the class: for even the existing statutes have not the merit of giving a priority to an honest purchaser over (\*)a dishonest one; but it is always a question between two honest purchasers; one must suffer; and the loss is simply transferred from one of the class to another of the vol. II. (\*229)

same class. Whether the proposed act would have aggravated the evils, we shall presently consider. Probably few persons have seen more titles than the writer of these remarks, and the cases within his knowledge of suppressed incumbrances are very few indeed; but he believes he never saw a single title in a register county in which important deeds had not been omitted to be

registered.

Such a general measure, if established, should be attended with small expense; for if expensive, its benefits would be purchased too dearly; and if they must be bought, small purchases and triffing mortgages would be diminished, to the great injury of the little farmer and the middle classes of society generally, and, therefore, of the country at large. If the rate of insurance be too high, the mariner prefers encountering the perils of the sea. Such a measure is of little use to small purchasers, for they, as experience has shown, are seldom exposed to danger from fraud. The registry would be as expensive upon a purchase of 300l. as upon one for 3,000l. The expense, therefore, should not exceed what a small purchase could fairly bear. Indeed, the measure is proposed to embrace small transactions, not for their protection, but to render the plan itself perfect. The office should be accessible, and therefore it should be local. The plan should be simple; otherwise the chance of a miscarriage would far outbalance any possible good. No man's rights should be unnecessarily, much less wantonly, broken in upon. Therefore of course, no man's title-deeds should be taken from him; and it would not obviate the objection to a provision requiring the deposit of the deeds, that a duplicate copy might be deposited in (\*) lieu of the original; for the rich ought not to be put to the expense, and the poor could not avail themselves of the option, but must deposit their deeds. A man whose deeds were thus deposited, would be prevented from (\*230)

indorsing any deed upon a prior one; by which, in thousands of cases, great expense is avoided, and he would not be able to raise money by a deposit of the deeds themselves. The first men in the city assert, that in moments of panic the want of such a power might be fatal. An Englishman likes to have his "sheep skins" in his own box in "his own castle." A deposit in London of all deeds would require a transmission of deeds from every part of England and Wales, and would expose every man's title-deeds to be lost or defaced. Besides, a collection in London of all the title-deeds of all the property in England and Wales would, in times of confusion and revolution, probably invite the first blow. They who approve of Spencean principles would doubtless consider it a considerable step towards an equal division of property, that no man could show a separate title to any given portion of it. The risk of fire; the dangers to be apprehended from the sudden ebullition of a mob; the dishonesty of inferior officers in purloining the old parchments for sale, and the like, may be added to the catalogue. The plan, moreover, would open a fine harvest to a legitimate government for taxation, and to an illegitimate government for confiscation. The State would possess, in one building, all the title-deeds to all the property in England and Wales. If the curse of civil war were to fall upon England, few would like the opposite faction to be in possession of their title-deeds. Crown would have uninterrupted access to all the documents of any individual whose estate it should seek to recover.

It would be a poor bribe to offer to the present holders of property, that they may retain the deeds they have. (\*)If we legislate for the future, we should not impose burdens which we would ourselves reject. Besides, the measure would affect every man's future title-deeds: so

that in a short time we should have only some of our own title-deeds in our own possession.

Such a plan should of course compel a man to no unnecessary disclosure of his dealings. The only legitimate object is notice to future contractors; for that purpose it is not necessary that the whole of the transaction should be disclosed. It is in vain to ask commercial men whether such disclosures are mischievous. No man desires to make his private affairs public, and the public have no right to pry into his affairs except for some legitimate object, and this case presents none. But if all the dealings of men of property, and all their title-deeds were to be disclosed to the world, the mischiefs would be obvious; immediate ruin would not unfrequently be occasioned; flaws in titles would be readily discovered; for the plan will not add to the learning or sagacity of real property lawyers; and Jews would have an opportunity of ascertaining to what extent they could safely supply the demands of an improvident heir. Many a young man has been saved from ruin because he had not the means of proving to money-lenders what his interest was in the family property.

Such a plan, moreover, whilst it gave protection to the diligent should not prefer a dishonest to an honest incumbrancer. As the only legitimate object of such a register is to impart knowledge, its object would be equally accomplished if the subsequent purchaser or mortgagee, although his deed was first registered, had clear notice of the prior deed. The plan, therefore, should leave the present rule of equity to operate, which would postpone the man who bought or advanced his money with notice of a prior right, although obviously express notice should (\*)in such a case be required; and it would be proper to make registry of itself notice, so as to make equitable estates as such binding, if registered. As a purchaser or mortgagee must employ an attorney, if a register be (\*232)

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established, the latter should be answerable to his employer for neglecting to search the register, or performing that duty in a perfunctory manner. The officer himself should be responsible to the suffering party in damages, for neglect, carelessness or misconduct.

Of course such an office should not be a Government one; nor be made a source of revenue. Taxation, the registries would not long escape; they offer an irresistible temptation to a Chancellor of the Exchequer, and if he acted cautiously they might in time be made a sure foundation for a new land-tax.

The existing statutes adhered pretty closely to the rules above mentioned. The offices were local, domestic, and readily accessible. No man was required to disclose any more of his deed than would identify it and its general nature, and show the property which it affected; and of course no one was compelled to give up the deeds themselves, or furnish duplicate copies of them. No unnecessary expense was created. The acts legalized no fraud, but left equity to interfere where a man, with notice of another's right, attempted to avail himself of the register as an engine of fraud. They left also every man's attorney to his common law liability for negligence, and rendered the registering officer himself liable for neglect. Government had nothing to do with the office. The register was appointed by the lord lieute-nant, and the clerks by the chief officer. These acts led to no extensive mischief, because the persons who knew that certain deeds were not registered, of course must have had notice of the deeds themselves; and the rule of equity, which the acts did not interfere with, forbad (\*) such a person to take advantage of the want of registry; and therefore it was indeed seldom that a title was defeated by the prior registry of a subsequent title. The system, however, does not work well; because it is expensive to make a long search, and almost impossible to make an effectual one.

Now the proposed act was to extend the system, and to have only one office in the metropolis for all England and Wales; to vest the appointment of a registrar-general in the Crown, and of the inferior officers in the Treasury. It is hard upon a government thus to have patronage forced upon it. If it be desirable to extend registration over the whole of the country, yet experience has shown that the plan of registration may not answer. The existing offices afforded the means of trying the new plan upon a limited scale; but instead of availing themselves of this opportunity, the proposers at once established the new system over the whole of England and Wales. Compensation was to have been given to the present holders of office; and however ill the new plan might have worked, it would with difficulty have been abolished, and certainly not without more compensations.

In all material respects the principles of the existing law were departed from. There was to be one great office in London. Men were to be compelled to deposit their deeds, or duplicates of them; and even this had not the merit of rendering it unnecessary to send other particulars with the deeds; so that the new provisions had all the inconveniences of the old, and imposed the additional necessity of depositing the deed, or a duplicate of it; indeed the inconveniences of the existing acts were aggravated, for they once and for all prescribed what was to be furnished, whilst the new bill rendered it necessary to send such particulars as the registrargeneral, after certain Gazette announcements, should (\*)from time to time require. The deeds were to be written as the officer should direct, or a fine was to be paid. Of course this plan exposed to public view every man's disposition of his property. Certain checks were intro
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duced in order to prevent improper inspections; but they were worse than useless, for they appeared to give a protection which in reality they never could have afforded. It is said that men will not search from curiosity; that wills are not inspected from that motive. But the fact is, that wills are constantly resorted to by persons who have no interest in the property. Besides, dead men's wills cannot be compared with living men's deeds. It is one thing to know what property a man takes under his father's will, and another how he has himself disposed of it. With a view to attack men's titles, daily resort will be had to the registry. Stratagems of all sorts:—purchases of a lot at an auction; bribes to agents or clerks, are now resorted to in order to obtain from a man's muniment chest the materials for an impeachment of his title. But it is urged, why is not this done as to copyholds? The answer is, that it frequently is, as far as the nature of the court rolls will admit. The writer has known several instances in which court rolls have furnished evidence for an action against the owner of copyholds, whilst none could be obtained for an attack upon his title to freeholds, although equally subject to the flaw.

The Committee of the House of Commons, in their Report, appear to suppose that all titles are in future to be free from flaws. They say, "that no present deed is "to be registered, and that the purchaser will take care "that his deed is effectual to give him the estate for which "he has contracted; and it can in no wise prejudice him to show to the world that he has really become the owner of that which he intended to make his by pur-chase. No defect patent upon deeds ought to be concealed. (\*) These deeds ought to be disclosed in such a manner as to preclude or defeat all persons who have no interest, and to let in the rightful owner. An exposite is the very object and chief aim of registration. No

"flaw need be disclosed in old deeds not registered; and "if the title appearing on the register is bad, defective or "doubtful, justice will be done, and the right established, "by an appeal to judicial decisions." This new view of the object of registration ought not to be lost sight of. We will protect you, say they, from putting on the register your present deeds, so as to guard against your exposing any defects in your title. But how is this reconcilable with the moral precepts which follow? Why are present defects to be concealed, and future ones exposed? But surely it is a duty of imperfect obligation to expose one's titledeeds to the world in order that any defects in them may be detected, and that a man may be stripped of all his property. The law of England acknowledges no such obligation; and few indeed are the cases in which an honest purchaser or mortgagee is compelled to produce his deeds. The Committee observe, in a strain of playful irony, that a purchaser will take care to have an effectual title. But with this view it may be prudent to enact, that conveyancers and solicitors shall in future commit no blunders.

The registry of the deeds themselves, we are told, will protect persons from the loss of them. Now, is this a legitimate object of legislation? Why not insure every man's house, stock and cattle for him, and charge him with the premium? Why not register his ledger and day-book, and his annual balances? Speaking generally, men should be left, under wise laws, to take care of themselves and their property.

By the proposed system title-deeds would have been (\*)exposed to danger, in being transmitted to London from all parts of the country; and this was not obviated by the channel of transmission being through the Post-office. The Postmaster-general had no doubt provided athletic postmen to carry the daily burdens; and for the mails, doubtless, light vans would have been substituted.

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As the great object of the act was to make registration binding in every event, a subsequent purchaser or mort-gagee, although he had notice of the prior conveyance, was not to be bound by it, if he got his own deed first upon the registry. And even in like circumstances a subsequent equitable title was to be made good against the prior purchaser or bona fide owner. This indeed would have led to the introduction of infinitely greater mischief than that which was proposed to be remedied by the act; for here was an express invitation to roguery. An agent might, although not avowedly, have a direct interest in neglecting to register the deed of his principal. And every profligate owner of an estate would be endeavoring to raise money upon it at the expense of a bona fide incumbernation purchaser whose confidence on the corpless. brancer or purchaser, whose confidence, or the carelessbrancer or purchaser, whose confidence, or the carelessness or misconduct of whose agent, had led to an omission to register his deed. Abolish the equitable operation of notice in these cases, and the most revolting frauds might be practised, which equity would not be able to relieve against. If the rule of equity, which is universal, is a bad one, correct or annul it, but do not in this particular case alter it, whilst you leave it thus stigmatized, to have its full bearing upon all other cases.

The Committee of the House of Commons thought that a subsequent deed registered ought to prevail over a prior deed unregistered, although the party who registered the subsequent deed had notice at the time that the prior deed had been executed; but that if it could be proved that the subsequent deed had been obtained by (\*)fraud, and proof of this is altogether independent of notice, registration certainly ought not to give that deed

notice, registration certainly ought not to give that deed validity; and they conceived that the registration of a fraudulent deed would not prevent a court of equity from giving that relief which the justice of the case requires. The proposed act therefore provided that priority should not be taken away by equity in consequence of notice, (\*237) 35 VOL. II.

and that where priority was given to any person claiming for valuable consideration under a subsequent assurance an equitable estate or interest, such priority should be enforced, although the person claiming under such subsequent assurance should have been affected with notice. Nothing can be more opposed than these provisions are to the principles of equity as administered in this country for centuries. Our rules of equity have had a powerful tendency to establish fair dealing between man and man in contracts. Let the Legislature beware how it wantonly disturbs those rules. Equity knows no higher fraud than a man's purchasing an estate which he is aware has already been sold and conveyed to another, with an intent to take advantage of a slip in the formalities of the registry of the first purchaser's conveyance, or perhaps of an omission to register it altogether. According to the new rule, a man may contract for the purchase of an estate and pay for it-of course he would take care to have a good bargain-although he knows that it has already been conveyed to a prior purchaser whose deed is not registered, and may then compel the first, the honest purchaser, to convey the estate to him. A court of iniquity should be established, to give perfection to such base transactions. In the first attempts by the Commissioners at legislation, although notice was made inoperative against a registered deed, yet rights of action were given to counterbalance the operation of the rule. This was an indirect and absurd mode of (\*)giving effect to notice. It was necessarily withdrawn; but the clause abolishing the operation of notice ought to have been withdrawn with the compensation clause.

In order to guard the purchaser against loss, it was at first suggested that the purchase-money might be deposited in the hands of a third person until the deed was registered. But might not the purchaser or seller disapprove of this? It would lead to great evils. The money
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might be lost by the dishonesty or failure of the depositary. The provisions of the act would have exposed every man's purchase or mortgage to such imminent hazard, that however remote might be his residence from the metropolis, his only safety would be in completing his purchase on the threshold of the metropolitan office, and then rushing into it with the deed for registration. Country solicitors would not allow all the business to be transacted by London solicitors. They would frequently send their clerks to town, or go themselves, to make the searches. The caveat which the act authorized to be entered in certain cases, only exhibited the danger of the system. The caution could not have been given in many cases, and in all would have been so troublesome and costly, such a clog upon contracts, that few would have had recourse to it unless it had become an ordinary mode of inflaming the agent's bill. Upon a registry there may, in every case, be a race, and the race should be to the swift. A man should not be allowed to give perfection to an imperfect transaction by a caveat which would operate against a prior perfect instrument.

But whatever might have been the diligence of the purchaser or incumbrancer, yet he might lose his estate or money through the carelessness, dishonesty or want of skill in the officers of the establishment. The system was a new one, and however excellent, it might have been found difficult to follow it literally, and the slightest (\*)blunder might have defeated the title, or the smallest delay might have proved fatal. There was little prospect of a man's recovering damages for any loss occasioned by the neglect, ignorance or misconduct of the officers. For the registrar-general was empowered to require such statements from time to time as he should think proper, to be sent with the assurances for regulating the entries, and in case no statement should have been sent conformably with such order, the purchaser or incumbrancer was

to be without remedy on account of any omission, delay or error in the entry. The remedy would practically have been nominal. The purchaser's own solicitor was improperly exonerated, if he directed an office search, and obtained a certificate of the result. If any loss was sustained by any omission, mistake or misfeasance of any officer, and the purchaser could maintain an action, the damages were to be paid out of the consolidated fund. Some Chancellor of the Exchequer would have started at an item of 100,000l. for damages, occasioned by a clerk's writing "Compton" for "Crompton"!

The plan would probably have given great countenance for a time to forged deeds. In the many instances in which confidential agents have forged deeds, they have always given sufficient publicity to them. The registry of a forged deed would not be more likely to bring it to the knowledge of the person whose name was forged, than the delivery of the deed to a purchaser or mortgagee; but the registry of such a deed would nevertheless induce others to place more confidence in it. The plan did not require deeds to be authenticated before they were registered. In that instance also, the existing rule was departed from.

It was no part of the plan to improve men's present titles; they were to remain subject to their original infirmities. The expense of erecting a building—of course (\*)a national ornament—and of the establishment, would have been large, but still such a measure should not have been made a source of revenue, or in other words, of taxation, and therefore, if ever the plan be adopted, provision should be made for reducing the fees to a level with the expenditure. The act exempted memorials from stamp duty. But as has already been remarked, the temptation would be too great for a Chancellor of the Exchequer long to resist; they would inevitably be subjected to a heavy duty, and thus the landed interest would (\*240)

be taxed for a security which the act would in vain affect to afford to them. For these reasons, the writer has always been averse to the extension of the system of registration; and an examination of the proposed measure, after all the amendments it received, has satisfied him that its certain operation, if it had passed into a law, would have been to create great expense, and cause much vexation; but that it was more than doubtful, whether to the general class of honest purchasers, the loss it would occasion would not have preponderated over the profit.

The act has been framed with ability, and the scheme of registration is a great improvement upon its predecessors; but the fault is in the system, which never can afford the security which it affects to give whilst it introduces dangers and difficulties that no talents can obviate. The examples afforded by the registers of Ireland and Scotland, offer no temptation to Enland to imitate them. In a few years, a general register would be destroyed by its own enormous weight.

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(\*)SECTION VI.

Of Protection from Acts of Papistry.

By the 11 & 12 Will. 3, c. 4, it was enacted, that papists who should not, within six months after attaining eighteen, take the oaths and subscribe the declaration therein mentioned, should, but as to himself or herself only, be incapable to take by descent, devise or limitation; and the estate should be enjoyed by the next of kin, being

a protestant, during the life, or until the conformity of such papist. And by this act papists were rendered incapable of purchasing lands, either in their own names, or in the names of trustees; and all estates made to them were declared to be utterly void and of none effect, to all intents, constructions and purposes whatsoever.

To remedy the inconveniences arising from this provision, it was by a modern statute (c) enacted, that no sale for a full and valuable consideration by a papist, of any lands, or of any interest therein theretofore made, or thereafter to be made, to a protestant purchaser, should be impeached by reason of any disability of the vendor, or of any persons under whom he claimed, in consequence of the 11 & 12 Will. 3(d); unless the person taking advantage of such disability should have recovered before the sale, or given notice of his claim to the purchaser, or before the contract for sale should have entered his claim at the quarter-sessions, and bona fide pursued his remedy. But it was expressly provided, that the clause in 11 & (\*)12 Will. 3, disabling papists from purchasing, should remain in full force.

In the case of Fairclaim v. Newland(e), the Court of King's Bench expressed an extra-judicial opinion, that the statute of Geo. 1. did not in every case authorize a sale by a papist to a protestant purchaser. They considered the statute of Will. 3. as having different provisions for persons of different ages, viz. as to those under eighteen, estates limited to them were vested for the benefit of their posterity, and these were intended to be able to convey to protestants; but as to others above eighteen, they are absolutely disabled from taking any estate by purchase, and the statute of George never intended to enable them to convey what they had not.

<sup>(</sup>c) 3 Geo. 1, c. 18. See 29 Geo. 3, c. 36, s. 4.

<sup>(</sup>d) Vide supra, vol. 2, p. 108.

<sup>(</sup>e) 8 Vin. Abr. 73, pl. 4. (\*242)

In a case before Lord Hardwicke, two years afterwards, it was insisted that the proviso in the act of George restrained the enacting part to a statute of James recited in the act of George; and that the statute of William, by the express words of the proviso, remained in full force. Lord Hardwicke, however, said "that the statute of William was to be sure made to prevent papists from acquiring new estates. Then came the statute of Geo. 1, and this statute, and the proviso in it, had a seeming repugnancy, and he would take notice, that the statute in this respect had always been doubtful; some people had thought that the proviso restrained the statute, and it was certainly a very odd proviso. But he thought the meaning of the proviso was only ex abundanti cautela against papists, and was not designed to affect purchasers; for if it were otherwise, the security to protestant purchasers, under the statute, would be a most doubtful security." And he considered the enacting part of the statutes as in full force for the benefit of a protestant (\*)purchaser, although it was not necessary to decide the point (f).

Mr. Wilbraham was one of the counsel for the plaintiff in the last case, and in an opinion given by him on this point a few years afterwards, he thought that the act of Geo. 1. authorized a sale by a papist purchaser to a protestant purchaser, and was not in that respect controlled by the proviso. He stated, that as the opinion of the eminent conveyancers, from the time of passing the act in 1717, till about the year 1740, had been, that popish purchasers might sell; and as it was the opinion of the present Chancellor, and several eminent lawyers, they might sell, he was of the same opinion, though the Court of King's Bench seemed to be of a contrary opinion in

<sup>(</sup>f) Wildigos v. Keeble, 8 Vin. Abr. 73, pl. 5. See S. C. cited, 1 Atk. 535; 2 Ves. 392, nom. Wildgoose v. Moore.

a trial at bar, in the year 1741, between Fairchild and Newland(g). Indeed it seems surprising that any doubt should have arisen on this point, as the act was passed for the express purpose of encouraging Roman catholics to sell their estates to protestants, however they might have acquired them; and the Legislature was only anxious that Roman catholics should not derive any power from the act to purchase and hold estates. A different construction would deprive the act of nearly all operation. It has now, however, long been thought the better opinion, that the proviso does not defeat the enacting part in favor of protestant purchasers, and on the authority of it many purchases of considerable consequence have been made(h).

The act requires the sale to be "for a full and valuable (\*)consideration;" but the purchase will be protected by the statute, although a year's purchase more might have been obtained for the estate, the consideration being only evidence of the reality of the purchase(i).

And although a purchase from a papist was made under suspicious circumstances, yet if the purchaser has paid any part of the purchase-money, he may plead the statute of Will. 3, in bar to a bill for a discovery from him, whether the vendor was a papist; for by his discovery the estate might perhaps be recovered at law, and then he would lose the money he had paid(k).

On this statute it remains to observe, that a purchaser having notice of the vendor being a papist, and under

<sup>(</sup>g) 2 Vol. Cas. and Opin. 60; and see several other opinions, ib. 54 to 71.

<sup>(</sup>h) See Mr. Butlers's learned note to Co. Litt. 391, a, s. 3. See also 43 Geo. 3, c. 30; and see O'Fallon v. Dillon, 2 Scho. & Lef. 13, for the construction of popery acts.

<sup>(</sup>i) Wildgoose v. Moore, 1 Atk. 535; 2 Ves. 392, cited; vide supra; 2 Atk. 210: Barnard Rep. Cha. 455; Smith v. Read, 1 Atk. 526.

<sup>(</sup>k) Harrison v. Southcote, 1 Atk. 528; 2 Ves. 389. (\*244)

a disability to hold, is immaterial, unless it was given to him by the person taking advantage of the disability according to the act of Geo. 1.

I have allowed this section to remain, as it is short, and possibly a knowledge of its contents may be required; but by the 10 Geo. 4, c. 7, s. 23, it is enacted, that after the passing of that act no oath or oaths shall be tendered to or required to be taken by his Majesty's subjects professing the Roman catholic religion, for enabling them to hold or enjoy any real or personal property, other than such as may by law be tendered to and required to be taken by his Majesty's other subjects.

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(\*)SECTION VII.

Of Protection from Defects in Recoveries.

Here may be mentioned the 4th section of the 14 Geo. 2, c. 20, for which the Profession is indebted to the late Mr. Pigot; whereby, after reciting, that by the default or neglect of persons employed in suffering common recoveries, it has happened, and may happen, that such recoveries are not entered on record, whereby purchasers for a valuable consideration may be defeated of their just rights; it is enacted, "that where any person or persons hath or have purchased, or shall purchase for a valuable consideration, any estate or estates, in lands, tenements or hereditaments, whereof a recovery or recoveries is, are or were necessary to be suffered, in order to complete the title, such person and persons, and all claiming under him, her or them, having been in possession of the purchased estate or estates from the time of such purchase, shall and

may, after the end of twenty years from the time of such purchase, produce in evidence the deed or deeds making a tenant to the writ or writs of entry, or other writs for suffering a common recovery or recoveries; and declaring the uses of a recovery or recoveries; and the deed or deeds so produced (the execution thereof being duly proved) shall, in all courts of law and equity, be deemed and taken as a good and sufficient evidence for such purchaser and purchasers, and those claiming under him, her or them, that such recovery or recoveries was or were duly suffered and perfected, according to the purport of such deed or deeds, in case no record can be found of such recovery or recoveries, or the same shall appear not to be regularly entered on record: provided always, that the person or persons making such deed or deeds as (\*)aforesaid, and declaring the uses of a common recovery or recoveries, had a sufficient estate and power to make a tenant to such writ or writs as aforesaid, and to suffer such common recovery or recoveries."

This clause will still operate upon existing titles; but its further operation is now at an end, for by the 3 & 4 Will. 4, c. 74(l), fines and recoveries are abolished. This last act contains several provisions in favor of purchasers. By s. 38, it is enacted, that when a tenant in tail of lands under a settlement shall have already created, or shall hereafter create in such lands, or any of them, a voidable estate in favor of a purchaser for valuable consideration, and shall afterwards under that act, by any assurance other than a lease not requiring enrolment, make a disposition of the lands in which such voidable estate shall be created, or any of them, such disposition, whatever its object may be, and whatever may be the extent of the estate intended to be thereby created, shall, if made by the tenant in tail with the consent of the pro-

<sup>(</sup>l) Supra, vol. 1. p. 380.

tector, if any, of the settlement, or by the tenant in tail alone, if there shall be no such protector, have the effect of confirming such voidable estate in the lands thereby disposed of to its full extent, as against all persons except those whose rights are saved by the act; but if at the time of making the disposition there shall be a protector of the settlement, and such protector shall not consent to the disposition, and the tenant in tail shall not without such consent be capable under this act of confirming the voidable estate to its full extent, then such disposition shall have the effect of confirming such voidable estate, so far as such tenant in tail would then be capable under the act of confirming the same without such consent, provided that if such disposition shall be made to a purchaser for valuable consideration, who shall (\*)not have express notice of the voidable estate, then the voidable estate shall not be confirmed as against such purchaser and the persons claiming under him.

And by s. 62, it is enacted, that where an actual tenant in tail of lands of any tenure, or a tenant in tail entitled to a base fee in lands of any tenure, shall have already created, or shall hereafter create in such lands, or any of them, a voidable estate in favor of a purchaser for valuable consideration, and such actual tenant in tail, or tenant in tail so entitled as aforesaid, shall be adjudged a bankrupt under a fiat, and the commissioner acting in the execution of such fiat shall make any disposition, under the act, of the lands in which such voidable estate shall be created, or any of them, then, if there shall be no protector of the settlement by which the estate tail of the actual tenant in tail, or the estate tail converted into a base fee, as the case may be, was created, or being such protector, he shall consent to the disposition by such commissioner as aforesaid, whether such commissioner may have made under the act a previous disposition of such

lands or not, or whether a prior sale or conveyance of the same lands shall have been made or not under the acts of 6 Geo. 4. and the 1 & 2 Will. 4, or either of them, or any other acts hereafter to be passed concerning bankrupts, the disposition by such commissioner shall have the effect of confirming such voidable estate in the lands thereby disposed of to its full extent, as against all persons except those whose rights are saved by that act; and if at the time of the disposition by such commissioner, in the case of an actual tenant in tail, there shall be a protector, and such protector shall not consent to the disposition by such commissioner, and such actual tenant in tail, if he had not been adjudged a bankrupt, would not without such consent have been capable under the act of confirming the voidable estate to its full extent, then and in (\*) such case such disposition shall have the effect of confirming such voidable estate, so far as such actual tenant in tail, if he had not been adjudged a bankrupt, could at the time of such disposition have been capable under the act of confirming the same without such consent; and if at any time after the disposition of such lands by such commissioner, and while only a base fee shall be subsisting in such lands, there shall cease to be a protector of such settlement, and such protector shall not have consented to the disposition by such commissioner, then such voidable estate, so far as the same may not have been previously confirmed, shall be confirmed to its full extent, as against all persons except those whose rights are saved by the act; provided that if the disposition by any such commissioner as aforesaid shall be made to a purchaser for valuable consideration, who shall not have express notice of the voidable estate, then the voidable estate shall not be confirmed against such purchaser and the persons claiming under him.

But by s. 47 it is enacted, that in cases of dispositions (\*248)

of lands under the act by tenants in tail thereof, and also in cases of consents by protectors of settlements to dispositions of lands under this act, by tenants in tail thereof, the jurisdiction of courts of equity shall be altogether excluded, either on the behalf of a person claiming for a valuable or meritorious consideration or not, in regard to the specific performance of contracts and the supplying of defects in the execution either of the powers of disposition given by the act to tenants in tail, or of the powers of consent given by the act to protectors of settlements, and the supplying under any circumstances of the want of execution of such powers of disposition and consent respectively, and in regard to giving effect in any other manner to any act or deed by a tenant in tail, or protector of a settlement, which in (\*)a court of law would not be an effectual disposition or consent under the Act; and that no disposition of lands under the act by a tenant in tail thereof in equity, and no consent by a protector of a settlement to a disposition of lands under the act by a tenant in tail thereof in equity, shall be of any force unless such disposition or consent would in case of an estate tail at law be an effectual disposition or consent under the act in a court of law.

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### SECTION VIII.

Of Protection from Defects in Sales for Land-Tax.

WE may here notice the 12th section of the 54 Geo. 3, c. 173, whereby, after reciting that for the purpose of redeeming land-tax, or of raising money for reimbursing the

stock or money previously transferred or paid as the consideration for redeeming land-tax charged on lands and other hereditaments belonging to persons for the time being seised or possessed, or entitled beneficially in possession to the rents and profits of, but not having the absolute estate or interest in, such lands or other hereditaments, or for some other purposes for which lands and hereditaments are authorized to be sold by such persons under the powers and provisions of the said act of the 42d of Geo. 3, or of some subsequent act relating to the redemption and sale of the land-tax, some sales of lands and other hereditaments may have been or may be made by persons so seised or entitled, not strictly authorized to sell by such powers and provisions without some further assurance in the law, or by reason that all the lands and other hereditaments of or to which the persons making such sales were respectively so seised or entitled, (\*)did not at the times of such sales stand limited and settled, and subject to or for the same uses, trusts, intents and purposes, or by reason that a greater quantity of an estate has been sold than may have been necessary to be sold for the authorized purposes, or by reason of some other mistake or inadvertence; It is enacted, that all sales so made as aforesaid, and all conveyances executed of the lands or other hereditaments so sold, provided the same have been respectively made and executed bona fide and for valuable consideration, and shall appear to have been made and executed under the authority and with the consent and approbation of the commissioners, as required by the said acts or any of them, in cases of sales under the powers of the said acts, shall be and the same are thereby ratified and confirmed from the respective periods at which such sales and conveyances were respectively made and executed, and shall be from such respective periods as valid and effectual in the law as if such sales and conveyances had been made and (\*250)

executed in strict conformity to the powers and provisions under which the same were intended to have effect, any thing in the said act of the 42d of Geo. 3, or of any such subsequent act, as aforesaid, to the contrary notwithstanding. But this provision is qualified by a proviso, that every person injured or prejudiced by any sales thereby confirmed shall be entitled to relief, either by the decree of a court of equity on a bill filed, or by a summary application to a court of equity by petition, and by the usual proceedings before the Master or other proper officer of the court, on such petition, and an order thereupon; and shall, under such decree or order, have an annual rent-charge to such an amount, and for and during such term or estate, and charged upon such lands or other hereditaments as such court shall order or direct; and the said court shall have full power to adjust the (\*)proportion and terms of such annual rent-charge be-tween different claimants, and to direct the settlement of such annual rent-charge in such manner as the said court shall, under the circumstances of the case, in its discretion, think proper; and shall also have power to make such order respecting the costs of the parties as the said court shall think fit.

By the 57th of Geo. 3, c. 100, s. 22, after reciting that it appeared that some deeds of sale, which previous to the revocation of the commissions theretofore granted under the royal sign-manual, enabling the persons therein named to be commissioners for the redemption and sale of the land-tax, were intended to have been executed by and under the authority of the persons named in such commissions, had been executed by the tenants for life, or other persons having authority, with the consent of such commissioners to make such sales, but had not been executed by such commissioners, and difficulties had in some instances arisen as to the mode of confirming titles under such imperfect conveyances, and that it was expe-

dient that a discretionary power should be given to the commissioners for the affairs of taxes of confirming the same, and also any deed of mortgage or grant that might for the same cause be found imperfect, it was therefore enacted, that upon production to the commissioners for the affairs of taxes, or any two of them, of any deeds of sale, mortgage or grant, that had been executed by any tenant or tenants for life, or other person or persons having authority under the land-tax redemption-acts for the time being, to make any such sale, mortgage or grant, with the consent and approbation of two or more of the commissioners for the time being, appointed by and under the royal sign-manual, but which deeds of sale, mortgage or grant had not been executed by the commissioners whose consent was necessary to the validity (\*)thereof respectively, it should be lawful for the said commissioners for the affairs of taxes, or any two of them, on their being satisfied that such deeds of sale, mortgage or grant would have been authorized and available under the powers and provisions of the said acts, or some of them, if two of the commissioners for the time being, acting by virtue of the royal sign-manual, had been parties to and executed the same, to sign and seal such deeds of sale, mortgage and grant, and to cause such indorsements to be made on such deeds respectively, as the said commissioners for the affairs of taxes might, under the circumstances of the case, think necessary or proper for showing their assent to and confirmation of such sales, mortgages or grants; and all such deeds of sale, mortgage or grant, which should be so signed and sealed by the said commissioners for the affairs of taxes, or any two of them, and upon which any such indorsement should be made, should be and the same were thereby respectively ratified and confirmed from the respective periods at which such sales, mortgages or grants were respectively intended to take effect, and the same should be from such respective (\*252)

periods as valid and effectual in the law, and be considered as conferring upon the respective purchasers or mortgagees of the lands and hereditaments therein respectively comprised, or upon the respective grantees of any rent-charges, and all persons claiming by, from, through, under or in trust for them respectively, as good a title to the lands or hereditaments sold or mortgaged, or to the rent-charges granted, as if two of the commissioners for the time being, acting under the royal sign-manual, and who would have been competent under the acts for the time being to consent to such sales, mortgages or grants respectively, had approved of and consented thereto respectively, by signing and sealing such deeds respectively; and no deeds of sale, mortgage or grant, so to be (\*)confirmed, should require any stamp-duty by reason of any execution thereof by the commissioners for the affairs of taxes, or by reason of any such indorsement to be made thereon, as aforesaid.

And it was further enacted(m), that where any contract should have been entered into for the redemption of any land-tax, and any contract should have been entered into for sale of any lands or other hereditaments for the purpose of raising money to complete the contract for the redemption of such land-tax, and it should appear that such contract for sale could not, under the powers and authorities of the land-tax redemption-acts, or any of them, or by reason of some defect in the title to the lands or other hereditaments comprised in such contracts for sale, be completed, it should be lawful for the commissioners for the affairs of taxes, or any two of them, to rescind and declare void such contract for redemption of land-tax, and thereupon it should be lawful for the said commissioners to make such orders, and give such directions, as they should think proper for the re-transfer of

(m) Sec. 23. (\*253)

any stock, or the re-payment of any money that might have been previously transferred or paid in pursuance of such rescinded contract; and the governor and company of the Bank of England, the commissioners for the reduction of the national debt, and the several receivers-general in England and collectors in Scotland, to whom the same might respectively appertain, should, upon a certificate of such contract being so rescinded, make, and they are hereby respectively required to make, such re-transfer or re-payment accordingly.

And after reciting that it was expedient to make provision for the enrolment and register of deeds, which had not been duly enrolled or registered pursuant to the directions of the several acts passed relating to the redemption (\*) of the land-tax, it was enacted(n), that all deeds required by the said acts, or any of them, to be enrolled or registered, should be valid and effectual, although the same should not have been or should not be enrolled or registered within the periods prescribed by the said acts respectively, provided the same should have been enrolled or registered before the passing of the said act, or should be enrolled or registered within twelve calendar months after the passing thereof; and that in any case such deeds should not be enrolled or registered within twelve calendar months after the passing of the said act, or any deeds thereafter to be executed under the powers of the said acts, or any of them, or of this present act, should not be enrolled or registered within six calendar months after the execution thereof respectively, it should be lawful for any two or more of the commissioners for the time being for the redemption and sale of the land-tax, if they should think fit, upon the production of any such deeds, to order the same to be enrolled or registered; and that all deeds to be enrolled or registered pursuant to any such order should be as valid and effectual as if the same had been enrolled or registered within the periods prescribed by the said acts, or by this present act; and that all conveyances made subsequent to any deeds already enrolled or registered, or to be enrolled or registered under this act, and depending in point of title on such deeds, should be of the same effect as if such deeds had been enrolled or registered on the day of the date thereof: nevertheless, without prejudice to the validity of any assurances theretofore made, or thereafter to be made, to correct or supply any defects arising from the want of such enrolment or registry.

And after reciting that for the purpose of redeeming or (\*)purchasing land-tax, or of raising money for reimbursing the stock or money previously transferred or paid as the consideration for redeeming land-tax, or for purchasing assignments of land-tax, or for some other purposes for which lands and hereditaments were authorized to be sold under the powers and provisions of the acts theretofore passed, relating to the redemption and sale of the land-tax or some of them, some sales of lands and other hereditaments had been made, the title to which, as derived under such sales, might be considered void or voidable, or liable to be impeached at law or in equity, or be liable to objections calculated to impede the free alienation thereof, it was further enacted(o), that all sales made, and all conveyances executed, of lands or other hereditaments sold for the purpose of redeeming or purchasing land-tax, or for raising money as thereinbefore was mentioned, provided such conveyances should appear to have been executed under the authority and with the consent and approbation of the respective commissioners

for the time being authorized to consent to sales made under the powers of the said acts respectively, or any of them, should be and the same were thereby ratified and confirmed from the respective periods at which such sales and conveyances were respectively made and executed, and the same should be from such respected periods valid and effectual, and be considered as conferring upon the respective purchasers of the lands and hereditaments therein respectively comprised, and all persons claiming by, from, through, under or in trust for them respectively, a good and valid title, both at law and in equity, to such lands and hereditaments, to all intents and purposes whatsoever; any thing in the said acts, or any law or custom to the contrary notwithstanding.

(\*) And it was further enacted(p), that every person who might conceive himself or herself injured or prejudiced by any sales thereby confirmed, should at any time within five years after the passing of the said act, if such persons should not be under any legal disability, but if he or she should be under any legal disability, then within five years next after such disability should be removed, be entitled to relief either by the decree of a court of equity, on a bill filed, or by a summary application to a court of equity by petition, and by the usual proceedings before the Master or other proper officer of the court on such petition, and an order thereupon, and should under such decree or order have an annual rent-charge to such amount, and for and during such term or estate, and charged upon such lands or other hereditaments, as such court should order or direct; and the said court should have full power to adjust the proportion and terms of such annual rent-charge between different claimants, and to direct the settlement of such annual rent-charge in such

manner as the said court should, under the circumstances

of the case, in its discretion, think proper; and should also have power to make such order respecting the costs of the parties as the court should think fit.

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## SECTION IX.

Of Protection from Crown Debts.

Formerly, where the seller was a debtor or accountant to the Crown, the title was not good until a quietus was entered up on record. And a purchaser could not be compelled to take the title, although the Crown consented to (\*) the payment of the purchase-money into the Exchequer on account of the debt(q).

To obviate this difficulty, it was by the 10th section of an act of the 1st and 2d year of Geo. 4, c. 121, intituled, "An act to alter and abolish certain forms and proceedings in the exchequer and audit-office relative to public accountants, and for making further provisions for the purpose of facilitating and expediting the passing of public accounts in Great Britain, and to render perpetual and amend an act, passed in the 54th year of his late Majesty, for the effectual examination of the accounts of certain colonial revenues," enacted, that in all cases where any estate belonging to a public accountant shall be sold under any writ of extent, or any decree or order of the Courts of Chancery or Exchequer, and the purchaser or purchasers thereof or of any part thereof shall have paid his, her or their purchase-money into the receipt of his Majesty's Exchequer,

<sup>(</sup>q) Brakespear v. Innes, V. C. Master of the Rolls, MS.

an entry of such payment shall be made by the commissioners for auditing the public accounts in the declared account of such public accountant, and from and after such payment and entry as aforesaid, such purchaser or purchasers, his, her and their heirs and assigns, shall be wholly exonerated and discharged from all further claims of his Majesty, his heirs or successors, for or in respect of any debt arising upon such declared account, although his, her or their purchase-money shall not be sufficient in amount to discharge the whole of the said debt.

This provision was made to meet a particular case, and is therefore by no means a general remedy. In the case alluded to, the debtor was dead, and there was a declared account against him, which, as he was dead, could not be increased by further receipts. Upon a petition by the (\*)seller after the act, Sir Thomas Plumer, Master of the Rolls, ordered the seller to pay the costs of the petition, and of the payment into the Exchequer, and of the entry being made by the commissioners. The purchaser claimed an abatement for dilapidations, and it was submitted whether the payment of the balance would satisfy the act. The Master of the Rolls held that it would.

With respect to the general operation statutes passed in favor of purchasers, it may be laid down as a rule, that equity will not permit them to be taken advantage of where the purchasers have notice of the incumbrance or deceit which the statutes were intended to guard them against, because qui scit se decipi non decipitur, and the resolutions respecting voluntary settlements must be considered anomalous.

#### SECTION X.

# Of Equitable Relief and Protection.

1. Thus have we taken a cursory view of the several statutes passed for the relief or protection of purchasers. The relief and protection afforded to purchasers by the rules of equity form the next branch of our inquiry.

A court of equity acts upon the conscience, and as it is impossible to attach any demand upon the conscience of a man who has purchased for a valuable consideration bona fide, and without notice of any claim on the estate, such a man is entitled to the peculiar favor and protection of a court of equity.

And it has been laid down as a general rule, that a purchaser bona fide, and for a valuable consideration, without notice of any defect in his title at the time he made his purchase, may buy or get in a statute, mortgage, (\*)or any other incumbrance (and that although it is satisfied); and if he can defend himself at law by any such incumbrance, his adversary shall never be aided in a court of equity for setting aside such incumbrance; for equity will not disarm a purchaser, but assist him; and precedents of this nature are very ancient and numerous, viz. where the Court hath refused to give any assistance against a purchaser, either to an heir, or to a vendor, or to the fatherless, or to creditors, or even to one purchaser against another (r)(407).

(r) Basset v. Nosworthy, Finch, 102; Jerrard v. Saunders, 2 Ves. jun. 454. See Anon. 2 Cha. Ca. 208; Hithcox v. Sedgwick, 2 Vern. 156; Goleborn v. Alcock, 2 Sim. 552.

<sup>(407)</sup> See Fitzsimmons v. Ogden, 7 Cranch, 2. Duvall v. Bibb, 4 Hen. & Munf. 113.

And the favor and protection of a court of equity is extended to a purchaser, not only where he has a prior legal estate, but also where he has a better right to call for the legal estate than any other person(s)(408).

A purchaser cannot, however, protect himself by taking a conveyance or assignment of a legal estate from a trustee in whom it was vested upon express trusts(t)(409).

The Court of Chancery will not supersede a commission of bankruptcy even for a fraud, where there have been purchasers under it(u); for a commission being superseded, all falls with it(x). So equity will not relieve against a bona fide purchaser without notice, although the remedy be gone by accident(y), nor will it compel him to discover any writings which may weaken his title(z); or (\*)take any advantage from him by which he may protect

- (s) See 2 Vern. 600; Willoughby v. Willoughby, 1 Term Rep. 763; Blake v. Sir Edward Hungerford, Prec. Cha. 158; Charlton v. Low, 3 P. Wms. 328. Ex parte Knott, 11 Ves. jun. 609; Shine v. Gough, 1 Ball & Beatty, 436.
  - (t) Saunders v. Dehew, 2 Vern. 271; 2 Freem. 123.
- (u) Ex parte Edwards, 10 Ves. jun. 104; ex parte Leman, 13 Ves. jun, 271; ex parte Rawson, 1 Ves. & Bea. 160; ex parte Lautour, 1 Mont. & Bligh. 89.
  - (x) See 1 Ves. & Bea. 66.
- (y) Harvy v. Woodhouse, Sel. Cha. Ca. 80; Bell v. Cundall, Ambl. 101.
- (z) Bishop of Worcester v. Parker, 2 Vern. 255; Hall v. Adkinson, 2 Vern. 463; 1 Eq. Ca. Abr. 333, pl. 54; Millard's case, 2 Freem. 43; Sir John Burlace v. Cook, 2 Freem. 24; Jerrard v. Saunders, 2 Ves. jun. 454.

<sup>(408)</sup> Of two equitable incumbrancers, she who hath the preferable right to call for the legal estate, is entitled to preference; though he hath not actually got it in, nor obtained an assignment, nor even possession of the deed conveying the outstanding legal title; and though his lien is subsequent in date to the other incumbrance. Williamson v. Gordon's Exrs. 5 Munf. 257.

<sup>(409)</sup> See Murray v. Ballou, 1 Johns. Ch. Rep. 566, 574, 575. (\*260)

himself at law, or obtain terms of his antagonist(a); neither will equity give any person an advantage over(b) a purchaser, or any assistance against him(c); and his having taken a collateral security for the title will not make his case worse(d)(1), unless the purchase by the vendor was fraudulent, in which case it would have considerable weight with a court of equity(e).

The rules on this subject have gone so far, that a purchaser bona fide, for valuable consideration, and without notice, has been allowed to take advantage of a deed which he stole out of a window by means of a ladder (f), and of a deed obtained by a third person without consideration, and by fraud (g).

If a man purchase for valuable consideration, without notice from a disseisor, and the disseisee is a trustee for another, although the general rule is, that a trustee is bound to convey, upon request, to his cestui que trust, yet if in this case the trustee refuse to convey the legal (\*)estate to the cestui que trust, or to suffer the latter to bring an ejectment in his (the trustee's) name, a court of

- (a) Walwynn r. Lee, 9 Ves. jun. 24.
- (b) Bechinall v. Arnold, 1 Vern. 354.
- (c) See Graham v. Graham, 1 Ves. 262.
- (d) Lowther v. Carleton, For. 187, S. C. MS. See, however, White v. Stringer, 2 Lev. 105; Jennings v. Selleck, 1 Vern. 467.
  - (e) How v. Weldon, 2 Ves. 516.
- (f) See a case cited in Sanders v. Deligne, 2 Freem. 123; and Siddon v. Charnells, Bunv. 298; and see Fagg's case, cited 1 Vern. 52, and reported in 1 Cha. Ca. 68, nomine Sherly v. Fagg, where the circumstance of theft does not appear.
  - (g) Harcourt v. Knowel, 2 Vern. 159, cited.

<sup>(</sup>I) In Lowther v. Carleton, the bond of indemnity was given by the executors of the first purchaser who bought without notice to the second purchaser, who bought of them with notice, and he was allowed to avail himself of the want of notice in the first purchaser.

equity will not compel the trustee to do so, because it would in effect be granting relief against a purchaser(h). This case strongly marks the favor shown to a bona fide purchaser.

Equity will relieve a bona fide purchaser without notice from ancient statutes, if there be no direct proof on either

side, and will decree them to be cancelled(i).

And this rule extends to mortgages, and all incumbrances which have lain dormant for a long time, and no demand made in respect thereof (k)(410).

So equity will relieve a purchaser for valuable consideration against a defective execution of a power, in the same manner as he will be relieved against a defective

surrender of copyholds (l)(411).

But if a devisee, having an estate for life, with a power to dispose of the inheritance by will, sell the estate in his life-time, equity cannot relieve the purchaser, although by the effect of accident he has got the legal estate in fee-simple; for, in a case like this, the testator cannot be understood to mean that the devisee should so execute the power. The intention is, that he should give by will, or not at all; and it is impossible to hold, that the execution of an instrument or deed, which, if it availed to

<sup>(</sup>h) Turner v. Back, 22 Vin. p. 21, pl. 5, where the cestui que trust claimed under a voluntary settlement.

<sup>(</sup>i) Burgh v. Wolf, Toth. 226; Smith v. Rosewell, ibid. 247; and see ibid. 224.

<sup>(</sup>k) See Abdy v. Loveday, Finch, 250; Sibson v. Fletcher, I Cha. Rep. 32.

<sup>(</sup>k) Vide infra; and see Chapman v. Gibson, 3 Bro. C. C. 229; Treat. of Powers, ch. 6.

<sup>(410)</sup> See Reigal v. Wood, 1 Johns. Ch. Rep. 406, et seq. In this case, however, there was fraud, in addition to the staleness of the claim.

<sup>(411)</sup> See Roberts v. Stanton, 2 Munf. 129.

any purpose, must avail to the destruction of that power the testator meant to remain capable of execution to the moment of the devisee's death, can be considered, in (\*) equity, an attempt in or towards the execution of the power(m).

The mistake or ignorance of any of the parties to a conveyance of their rights in the estate will not turn to the prejudice of a bona fide purchaser for a valuable consideration (n).

If, however, upon a purchase, any person is required to join to obviate an objection to the title, and the objection is stated in such a manner as not to convey full information, the purchaser cannot avail himself of the instrument against the person executing it(o).

But if a person having only a general statement that there are objections to a title which his concurrence will obviate, upon that communication executes an instrument and conveys, there is nothing to affect the conscience of the purchaser, so that the person conveying could ever get the estate back. If he does not ask the nature of the objections, he determines against himself as to any question between him and the purchaser, if the deed does not show that the objections were withheld from him(p).

If a person having a right to an estate permit or encourage a purchaser to buy it of another, the purchaser

<sup>(</sup>m) Per Lord Eldon; Reid v. Shergold, 10 Ves. jun. 370. The opinions of several eminent lawyers were taken on this case, before it went into court, and they all agreed that the case was desperate. In fact, it was owing to those discussions that the plaintiff in this cause knew of his claim, and recovered the estate. Vide supra, vol. i. p. 12.

<sup>(</sup>n) Malden v. Menill, 2 Atk. 8.

<sup>(</sup>o) Lord Braybroke v. Inskip, 8 Ves. jun. 417.

<sup>(</sup>p) Lord Braybroke v. Inskip, ubi sup. See 3 Swanst. 73.

shall hold it against the person who has the right(q)(412),

although covert(r), or under age(s).

(\*) And the same rule prevails even where the representation is made through a mistake, if the person making it might have had notice of his right(t)(1).

So where a person, intending to buy an estate, inquires of another whether he has any incumbrance on the estate, and states his intention to buy it, if the person of whom the inquiry is made deny the fact, equity will relieve the purchaser against the incumbrance (u). Again, where a purchaser of an equitable right inquires of the trustee of the legal estate, whether he knows of any incumbrance, and he answers in the negative, if it turn out that he had notice of any charge, he will be answerable to the purchaser, although he plead forgetfulness in excuse(x).

But a person having an incumbrance upon an estate is

(q) Hobs v. Norton, 2 Cha. Ca. 128; Hanning v. Ferrers, 2 Eq. Ca. Abr. 356, pl. 20; and see 1 Freem. 310; 16 Ves. jun. 253.

(r) Savage v. Forster, 9 Mod. 35; and see Evans v. Bicknell, 6

Ves. jun. 174.

- (s) Watts v. Creswell, 9 Vin. 415; 9 Mod. 38. 96, 97; 4 Bro. C. C. 507, n.; Clare v. Earl of Bedford, 13 Vin. 536; and see 3 Cha. Ca. 85. 123; Cory v. Gerteken, 2 Madd. 46.
- (t) Pearson v. Morgan, 2 Bro. C. C. 388\*; see also Teasdale v. Teasdale, Sel. Cha. Ca. 59; but observe the circumstances of that case.

(u) Supra, vol. i. p. 9.

- (x) Burrowes v. Lock, 10 Ves. jun. 470; supra, vol. i. p. 5.
- (I) Sed qu. this as a general rule, unless there be fraud? See Haycroft v. Creasy, 2 East, 92; Tapp v. Lee, 3 Bos. & Pull. 367; and see Holmes v. Custance, 12 Ves. jun. 279.

<sup>(412)</sup> See Green v. Price, 1 Munf. 449. Taylor v. Cole, 4 Munf. 351; and see Pollard v. Cartwright, 2 Hen. &. Munf. 116. Hooe & Harrison v. Pierce, 1 Wash. 217. Applebury v. Anthony's Exrs. 1 Wash. 289. Niven v. Belknap, on appeal, 2 Johns. Rep. 573. Livingston v. Byrne, on appeal, 11 Johns. Rep. 555. See also, Brinckerhoff v. Lansing, 4 Johns. Ch. Rep. 65, Stoors v. Barker, 6 Johns. Ch. Rep. 166. See Wendell v. Rensselaer, 1 Johns. Ch. Rep. 344. (\*263)

not bound to give notice of it to any person whom he knows to be in treaty for the purchase of the estate (y).

If a purchaser take a defective conveyance from the vendor, equity will compel the vendor and his heirs, and all other persons claiming under him by act of law, as assignees of a bankrupt, although without notice, and even persons claiming as purchasers for valuable consideration, if with notice, to make good the conveyance(z)(413).

(y) Osborn v. Lea, 9 Mod. 96.

(z) Jaques v. Huntly, 1 Cha. Rep. 5, cited; Taylor v. Wheeler, 2 Vern. 564; Morse v. Faulkner, 1 Anstr. 11; and see 2 Ves. jun. 151; 6 Ves. jun. 745; 11 Ves. jun. 625. See vol. ii. 103, supra.

(413) See Somerville v. Trueman, 4 Har. & M'Hen. 43. M'Williams v. Nisley, 2 Serg. & Rawle, 515.

In the language of Chief Justice Tilghman " when articles of agreement are entered into, by which a conveyance is covenanted to be made, and afterwards a conveyance is made, and accepted, which differs in some respects from the articles, the deed of conveyance, which is the consummation of the agreement, shall be taken for the ultimate intent of the parties, and prevail over the articles. But if the deed is accepted under a misapprehension, occasioned by the fault of the plaintiff, however strict the law might be, they would be entitled to relief in equity." Crotzer v. Russell, 9 S. & R. 78. But in Brown v. Moorhead, 8 ib. 569, where the article of agreement stipulated for the conveyance of a tract of land, and also to convey " all the right, title, claim and interest of other persons in another tract of land; held, that in an action for the purchase money, the defendant might show by the articles what the agreement was, although a deed had been given and accepted of the first tract; because that was but a fulfilment in part of what the vendor had covenanted to do by the articles." Without this evidence, the Court and jury would be unable to decide, what would be the equity of the case between the parties.

So, in Frederick v. Campbell, 14 S. & R. 293, which was an action on a bond given for the consideration of land contracted for by articles, which was stipulated to contain 225 acres; and the deed subsequently executed described the land by boundaries, calling it 225 acres; held, that it was competent for the defendant to show in evidence any deception practised in the outset of the transaction. He was admitted to prove that at the execution of the articles, the plaintiff asserted that the land contained 225 acres, and said he would make his assertion good.

(\*) So a purchaser, by a defective conveyance, will be relieved against persons who did not consider the land as their original or primary security; although they may have obtained an advantage at law(a).

And if a man sell an estate to which he has no title, and after the conveyance acquire the title, he will be

compelled to convey it to the purchaser.

But it seems to have been considered that this is a personal equity attaching on the conscience of the party, and not descending with the land; and therefore, that if the vendor do not in his life-time confirm the title, and the estate descend to the heir at law, he will not be bound by his ancestor's contract(b). This opinion, however, deserves great consideration.

Where the conveyance is not perfected with the solemnities positively required by an act of parliament, as in the case of the ship-registry acts, equity cannot relieve, as it would be against the policy of the acts, unless perhaps there were direct fraud, in which case it should seem that equity would relieve (c)(414).

It has been said, that every person who takes an assignment of a *chose* in action gives personal confidence that there is no lien upon  $\operatorname{it}(d)$ . Upon the purchase of a *chose* in action, or of any equitable right, it is the invariable practice of the Profession to require notice of the sale to be given to the trustee. This of course binds his con-

<sup>(</sup>a) Burgh v. Francis, Finch, 28; and see Gilb. For. Rom. £23.

<sup>(</sup>b) Morse v. Faulkner, 1 Anstr. 11; Carleton v. Leighton, 3 Mer. p. 667. See Bensley v. Burdon, 2 Sim. & Stu. 516, upon appeal affirmed; but the principal point upon estoppel has since been properly overruled.

<sup>(</sup>c) Speldt v. Lechmere, 13 Ves. jun. 588; ex parte Yallop, 15 Ves. jun. 60. See ex parte Wright, 1 Rose, 308.

<sup>(</sup>d) Per Lord Thurlow, in casu Davies v. Austen, 1 Ves. jun. 247.

<sup>(414)</sup> See Astor v. Wells, 4 Wheat. 466.

<sup>(\*264)</sup> 

science. And notwithstanding the general rule that, with respect to equitable rights, qui prior est tempore (\*)potior est jure(e), it seems probable that equity would prefer a subsequent purchaser who had given a proper notice to the trustee to a prior purchaser who had neglected to do so. At least there is a case(f) which seems, in some measure, to authorize this conclusion(415).

Since these observations were published, this point has been elaborately discussed in several cases. Sir Thomas Plumer held that priority in time must prevail, and that mere neglect of notice was not sufficient to postpone a purchaser. In order to deprive him of his priority, it was necessary that there should be such laches as in a court of equity amounted to fraud(g). This decision the learned Judge forgot (and the bar was not aware of it) upon the discussion in two subsequent cases(h), in which the same learned Judge decided that the purchaser who had alone made inquiry, and given notice, was to be preferred over the prior purchaser, although he had simply neglected to give notice. And these decisions were affirmed upon appeal by the Lord Chancellor; so that a prior purchaser who has not given notice will be postponed to a subsequent purchaser who has.

It may be laid down as a general rule, that a purchaser of a *chose* in action(i)(416), or of any equitable title(k)

- (e) See Tourville v. Naish, 3 P. Wms. 307; and see 2 P. Wms. 495; 15 Ves. jun. 354; 2 Taunt. 415.
- (f) Stanhope v. Earl Verney, Butler's n. (1) to Co. Litt. 290, b.; and see 1 Ves. 367; 9 Ves. jun. 410; but see Frere v. Moore, 8 Pri. 475, the facts of which do not appear to have been ascertained.
  - (g) Cooper v. Tynman, 3 Russ. 60.
  - (h) Dearle v. Hall, Loveridge v. Cooper, 3 Russ. 1.
- (i) Davies v. Austen, ubi sup.; Turton v. Benson, 2 Vern. 764; Priddy v. Rose, 3 Mer. 86; Hamilton v. Stokes, 4 Price, 161.
  - (k) Whitfield v. Fausset, 1 Ves. 387.

<sup>(415)</sup> See Berry v. Mutual Ins. Co. 2 Johns. Ch. Rep. 603, 608.

<sup>(416)</sup> See Murray v. Sylburn, 2 Johns. Ch. Rep. 443. Norton v. (\*265)

(417), must always abide by the case of the person from whom he buys, and will be entitled to all the remedies of the seller(l). And yet as we have seen(m), there may be (\*)a case in which a purchaser of a chose in action, merely by sustaining that character, will be in a better situation than the person was of whom he bought. And it seems, that where a person purchases a specific legacy, delivered to the legatee by the executor, if there is a deficiency of assets, the creditors must follow their demand in reasonable time, or equity will not assist them, otherwise legacies would be eternally locked up, and creditors encouraged in their laches, and to call on purchasers of legacies to refund at a great length of time(n).

So if trustees suffer a tenant for life of a renewable leasehold to enjoy all the profits in breach of a trust reposed in them to renew out of the rents and profits, the assets of the tenant for life will be applicable in the first instance to their indemnity, and a purchaser from the tenant for life of his life-interest, will also, it seems, be answerable to the person for whose benefit the renewal ought to have been made. But, as between the trustees and the purchaser, the latter is not primarily answerable.

(1) See ex parte Lloyd, 17 Ves. jun. 245.

(m) George v. Milbanke, 9 Ves. jun. 190; supra, vol. ii. p. 169.

(n) Cholmondley v. Orford, Ch. H. T. 158, MS.

(417) See Porter v. Breckenridge, Hardin, 21. Murray v. Gouverneur, 2 Johns. Cas. 438.

(\*266)

Rose, 2 Wash. 233, 254. Wheeler v. Hughes, 1 Dall. 28. See also, 2 Yeates, 23. Livingston v. Dean, 2 Johns. Ch. Rep. 479. Clute v. Robinson, on appeal, 2 Johns. Rep. 595. Livingston v. Hubbs, 2 Johns. Ch. Rep. 512. Rodriguez v. Haffernan, 5 Johns. Ch. Rep. 417; And see Chamberlain v. Gorham, 20 Johns. Rep. 144. Bank of Niagara v. M'Cracken, 18 Johns. Rep. 493. Furman v. Haskin, 2 Caines' Rep. 369. But an assignee will not be subject to any latent equity residing in a stranger, against the assignor. Murray v. Sylburn; and Livingston v. Dean, ut supra. See Wilcox v. Calloway, 1 Wash. Rep. 41.

If they permit the tenant for life to apply to his own use all the rents and profits, and abstain from performing the trust, they cannot contend that it was the purchaser's duty to withhold any part of the rents and profits, or the consideration that came in place of them(0).

Where a purchaser, after the conveyance, or even before the conveyance, in prospect of the articles for sale being carried into execution, has laid out money in lasting improvements, there are but few cases in which he will not be allowed for them, in case the aid of a court of equity is required to relieve against the purchase (p)(418).

And even supposing the Court to be unwilling to make (\*)an allowance for repairs and improvements, yet if an account of rents and profits is to be taken, and the plaintiff will not accept the account, according to the value of the estate when the purchaser entered, but insists to have the account taken according to the present value, the Court will compel him to make an allowance for repairs and improvements (q).

If, however, a man has acted fraudulently, and is conscious of a defect in his title, and with that conviction in his mind expends a sum of money in improvements, he is not entitled to avail himself of it(419). If a different rule should prevail, it would certainly, as Lord Clare re-

<sup>(</sup>o) Ld. Montford v. Ld. Cadogan, 17 Ves. jun. 485.

<sup>(</sup>p) Edlin v. Batalay, 2 Lev. 152; Peterson v. Hickman, 1 Cha. Rep. 3, cited; Whalley v. Whalley, 1 Vern. 484; Savage v. Taylor, For. 234; Baugh v. Price, 1 Wils. 320; ex parte Hughes, 6 Ves. jun. 617; ex parte James, 8 Ves. jun. 337; Browne v. Odea, 1 Scho. & Lef. 115; and see 9 Mod. 412; Barnard. Cha. Rep. 450; 1 Vern. 159; Shine v. Gough, 1 Ball & Beatty, 444.

<sup>(</sup>q) Thomlinson v. Smith, Finch, 378.

<sup>(418)</sup> See Witherspoon v. Andersons Exis. 3 Des. 245. See Parkurst v. Van Cortlandt, 1 Johns. Ch. Rep. 273. S. C. on appeal, 14 Johns. Rep. 15. Benedict v. Lynch, 1 Johns. Ch. Rep. 370.

<sup>(419)</sup> See Gillespie v. Moon, 2 Johns. Ch. Rep. 585, 602.

marked, fully justify a proposition once stated at the bar of the Court of Chancery in Ireland, that it was a common equity to improve the right owner out of the possession of his estate. However, if the sums are large, that circumstance may influence the Court in decreeing an account from the time of filing the bill only, and not from the time of taking possession(r).

But if the aid of a court of equity is not required, and a person can recover the estate at law, equity, unless there be fraud, cannot, it is conceived, relieve the purchaser on account of money laid out in repairs and improvements; but must dismiss a bill for that purpose with costs(s).

Where a person purchases with notice of an incumbrance, although he pay off some to which that incumbrance was posterior, yet he lets it in as the first (\*)incumbrance on the estate, and cannot, as against that incumbrance, claim the benefit of the prior incumbrances which he has paid off(t).

And if a mortgagee would avail himself of prior incumbrances which he pays off against subsequent subsisting ones, he should actually keep on foot those which he pays off, and not allow them to be extinguished (u). The distinction is a very subtle one.

It seems, that where two persons claim a reversion, to which only one can be entitled, a bill will lie to per-

(r) Kenny v. Browne, 3 Ridgw. P. C. 518.

(\*268)

<sup>(</sup>s) See Needler v. Wright, Nels. Cha. Rep. 57; but see Peterson v. Hickman, 1 Cha. Rep. 3, cited. This case, probably, turned on the fraud in the wife standing by while the improvements were made, without giving notice of her claim to the tenant.

<sup>(</sup>t) Toulmin v. Steere, 3 Mer. 210. This case was appealed from; but the appeal was stopped by a relation of the appellants, who chose to pay off the incumbrance.

<sup>(</sup>u) Parry v. Wright, 1 Sim. & Stu. 369; affirmed upon appeal by the L. C., 5 Russ. 142, sed qu.

petuate testimony, although both of them are purchasers, or only one of them is a purchaser(x); for such a bill calls for no discovery from the defendant, but merely prays to secure that testimony, which might be had at that time if the circumstances called for it(I).

II. Thus have we seen how peculiarly a bona fide purchaser without notice is favored and protected by equity. But if a purchaser have notice of any claim, or incumbrance, his conscience is affected; and a court of equity will then not only refuse to interfere in his favor, but will assist the claimant or incumbrancer in establishing his claims against him; his having given a consideration will not avail him; for, as Lord Hardwicke observes, he throws away his money voluntarily, and of his own free will(y)(420). And it may be laid down as (\*)a general rule, that a purchaser with notice is in equity bound to the same extent, and in the same manner, as the person was of whom he purchased(z)(421). Thus, sup-

<sup>(</sup>x) See Lord Dursley v. Fitzhardinge, 6 Ves. jun. 251.

<sup>(</sup>y) See 3 Atk. 238; Fitz. T. Subpæna, pl. 2.

<sup>(</sup>z) Winged v. Lefebury, 1 Eq. Ca. Abr. 32, pl. 43; Jackson's case, Lane, 60; Gore v. Wiglesworth, cited, *ibid*; Earl Brook v. Bulkeley, 2 Ves. 498; Taylor v. Stibbert, 2 Ves. jun. 437; Lord Verney v. Carding, 1 Scho. & Lef. 345, cited; Crofton v. Ormsby, 2 Scho. & Lef. 583; Dunbar v. Tredennick, 2 Ball & Beat. 304.

<sup>(</sup>I) But note, the point was not settled, and it does not seem quite clear what determination it would receive; as retaining such a bill is evidently granting relief against a purchaser.

<sup>(420)</sup> See Murray v. Finster, 2 Johns. Ch. Rep. 155, 157.

<sup>(421)</sup> See Frost v. Beekman, 1 Johns. Ch. Rep. 288, 301. Murray v. Ballou, 1 Johns. Ch. Rep. 556. Champion v. Brown, 6 Johns. Ch. Rep. 398, 403. Shepard v. M'Evers, 4 Johns. Ch. Rep. 136. Simon's Les. v. Gibson, 1 Yeates, 291. Davison v. Waite, 2 Munf. 527. And see Willis' Les. v. Bucher, 2 Binn. 455. Cuyler v. Bradt, 2 Caines' Cas. in Error, 326. Wilcox v. Calloway, 1 Wash. Rep. 41. (\*269)

pose trustees for preserving contingent remainders to join in destroying them, and to convey the estate to a purchaser, if the purchaser buy for a valuable consideration, and without notice, he cannot be affected. But if he buy with notice of the trust, although for a valuable consideration, he must convey the estate to the uses of the settlement(a)(422).

But we may here observe, that it is at last settled, that trustees joining in a recovery after the first tenant in tail is of age, is not a breach of trust, and therefore a purchaser may safely buy under the title acquired by the recovery(b). This point cannot arise upon new titles, for, as we have seen, fines and recoveries are abolished, and the protector of a settlement cannot commit a breach of trust in joining with the tenant in tail in barring the remainders(c).

A purchaser will be bound, even at law, by a parol agreement for a lease not within the statute of frauds, the granting of which constituted part of the consideration, although it be not mentioned in the agreement for purchase, and the rent be not fixed (d).

But where the consent of a person is essential to the validity of a lease agreed to be granted, and he himself purchases the inheritance, although with full notice, yet he will not be bound by the agreement.

- (\*)This was decided in a recent case, where a copyholder granted a lease to one Luffkin for a year, and so from year to year, if the lord would give a licence. The
  - (a) Mansell v. Mansell, 2 P. Wms. 678.
- (b) Biscoe v. Perkins, 1 Ves. & Bea. 485. The Lord Chancellor has since decided the same point in the same way.
- (c) 3 & 4 W. 4, c. 74; supra, vol. i. 193, 194, 356, 359, 380; ii. 246.
  - (d) Dean v. Cartwright, 4 East, 29.

<sup>(422)</sup> See Murray v. Finster, 2 Johns. Ch. Rep. 155. (\*270)

lord of the manor purchased the reversion himself, and took a surrender in the name of a trustee. The terms of the demise were correctly stated in the abstract of the title; the agreement contained an exception of all subsisting leases (if any there were), and in a deed from the vendor to the purchaser's trustee, there was an exception in the covenant against incumbrances "of the several and respective subsisting lease or leases, or agreements for leases, under which the present tenants now hold the premises." After the purchase, the lord gave notice to his trustee, that he would not grant any licence to any copyholder of his manor to demise. The trustee then gave notice to Luffkin to quit, and brought an ejectment, in which he recovered, the Court of King's Bench being of opinion that the lease did not operate as a lease for fourteen years(e). Then Luffkin filed a bill against the trustee and the lord for a specific performance, on the ground of the lord having notice of the lease, and of its being excepted in the contract, &c. A case was directed to the Court of Common Pleas, who held, first, that the lease was not a lease for fourteen years; and secondly, that the tenant had no remedy on the covenant in the lease for quiet enjoyment(f). The cause then came on upon the equity reserved, and was fully argued by Romilly for the plaintiff, and by Hollist and Bosanquet for the defendants. And Lord Eldon, after taking a day to consider, pronounced judgment shortly, that there was not equity sufficient to support the bill(g).

This decision demands particular attention. It seems founded on great principles of equity, although the purchaser had voluntarily placed himself in a situation in (\*)which it was his interest to refuse his consent, without

<sup>(</sup>e) Doe v. Luffkin, 4 East, 221.

<sup>(</sup>f) 1 New Rep. 163.

<sup>(</sup>g) Ch. 15th July 1805. S. C. 11 Ves. jun. 170.

which the lease could not be sustained. We cannot fail to distinguish this case from that where a man, having a partial interest in an estate, agrees to grant a lease which his interest does not enable him to grant; and then joins with the remainder-man in selling the estate to a purchaser, with full notice of the agreement. There equity rightly holds the purchaser bound by the agreement. The vendor was bound to grant the lease, or to answer in damages for non-performance of the agreement; and as the purchaser had notice of the contract, and takes an estate which enables him to perform it, it is but just that he should be compelled to do so, in order to exonerate the vendor from an action for breach of the contract. And on this ground it should seem, that if in the case of Luffkin v. Nunn, Luffkin could have recovered on the covenant for quiet enjoyment, the lord would have been compelled to perform the agreement. If this had not been Lord Eldon's opinion, he would not have asked the Court of Common Pleas, whether Luffkin could recover on the covenant for quiet enjoyment in case he were evicted. Lord Redesdale appears to have overlooked this distinction, when in a late case he found fault with one point in the case of Taylor v. Stibbert, viz. that he thought the purchaser had a right to say, that having purchased from the son as well as the father, and the covenant not being binding on the son's estate, he should not be bound further than as he purchased an estate which was bound, and therefore that notice, or no notice, was of no consequence to him(h). The doctrine, however, can only apply to cases where the purchaser ought to indemnify the seller against the agreement.

Where a purchaser buys a reversion expectant upon (\*) a particular estate, as, subject to the life-estate of *I. S.*, although it turn out that no such estate is in existence,

<sup>(</sup>h) See 2 Scho. & Lef. 599.

yet I. S. will be decreed to hold the estate during his life, against the purchaser(i).

There was a case decided in Ireland, where the purchaser set aside the leases subsisting at the time of the sale, and he was decreed to be a trustee for the vendor(k). And it was treated as clear, that if an estate be sold subject to existing leases, and the vendor discover that the leases he had granted were obtained from him by fraud, he would be entitled to set them aside, and to hold the estate during the continuance of such leases, paying the rents to the purchaser thereby reserved, and performing the covenants in the leases (l). And upon this principle, where a devisee in fee, subject to an executory devise over in fee, suffered a recovery, and sold the estate, and received all the money, and he and the devisee over joined in the conveyance (which of course operated as a release of the executory interest), subject to leases granted by the first devisee, it was decided that the devisee over (the event having happened upon which it was to arise) was entitled to impeach the leases for his own benefit, securing to the purchaser the rents and the benefits of the agreements(m).

But all these points are of great importance, and will require, it is apprehended, much further consideration before they can be adopted as binding rules.

Although whilst fines operated a purchaser with notice had to strengthen his estate, levied a fine, and five years had passed without a claim, yet the fine and nonclaim would have been inoperative; for as he purchased with

<sup>(</sup>i) Walton v. Stanford, 2 Vern. 279. See Doe v. Archer, 1 Bos. & Pull. 531.

<sup>(</sup>k) 2 Ball & Beat. 548.

<sup>(</sup>l) 2 Ball & Beat. 547.

<sup>(</sup>m) Maguire v. Armstrong, 2 Ball & Beat. 538; see Blakeney v. Bagott, 3 Bligh, N. S. 248.

(\*)notice, notwithstanding any consideration paid by him he was but a trustee, and so the estate not being displaced, the fine could not bar(n); so, although a man purchase under a decree in equity, yet, if the decree was obtained by fraud, he cannot protect himself (o).

But where it was a mere legal title, and a man had purchased an estate which he saw himself had a defect upon the face of the deeds, yet the fine would have been a bar, and not affect him with notice, so as to make him a trustee for the person who had the right, because this would be carrying it much too far, for the defect upon the face of the deeds was often the occasion of the fine being levied. This was laid down by Lord Hardwicke(p). And it was resolved in Fermor's case(q), that if A. purchases land of B., and afterwards perceiving that B. had but defeasible title, and that C. had a right to it, A.(I) levies a fine with proclamations to a stranger, or takes a fine from another with proclamations, with the intent to bar the right of C.; this fine, so levied by consent, should bind, for nothing was done in this case which was not lawful. Fines cannot in future be levied; but still with reference to existing titles, it is necessary to know what the rule was. The accepting a release of a right is in no case an acknowledgment that a right existed. If it were an admission of right, it must always be liable to objections, because the consideration for the release is always much less than the value of the thing demanded; but in truth, the consideration given being less than the value of the thing demanded, the transaction

<sup>(</sup>n) 1 Vern. 149; 2 Atk. 631; Kennedy v. Daly, 1 Scho. & Lef. 355.

<sup>(</sup>o) Kennedy v. Daly, 1 Scho. & Lef. 335; Giffard v. Hort, ib. 386.

<sup>(</sup>p) 2 Atk. 631; and see ib. 390.

<sup>(</sup>q) 3 Rep. 79, a.

<sup>(</sup>I) B. is by mistake inserted in the report for A.

<sup>(\*273)</sup> 

(\*) amounts to a denial of the right, instead of an acknowledgment(r).

Notice, before actual payment of all the money, although it be secured(s)(423), and the conveyance actually executed(t)(424), or before the execution of the conveyance, notwithstanding that the money be paid(u)(425), is equivalent to notice before the contract.

But if the conveyance be executed, and the money paid, a purchaser will not be affected by notice of an incumbrance, although a prior incumbrance, intended to be discharged, is not paid off (v).

And notice at the time of getting in a precedent incumbrance, as a protection against mesne charges, is not material, so that he had not notice at the time of the purchase (w)(426). Indeed, after a conveyance is executed, it is seldom that a purchaser thinks of procuring a prior legal estate, unless he discovers some incumbrance on the estate, against which he is anxious to protect himself.

But although a purchaser has notice of an equitable claim by which his conscience is affected, yet a person purchasing from him *bona fide*, and without notice of the right, will not be bound by it(x)(427).

- (r) Underwood r. Lord Courtown, 2 Scho. & Lef. 68.
- (s) Tourville v. Naish, 3 P. Wms. 307; Story v. Ld. Winsor, 2 Atk.
  630; More v. Mayhew, 1 Cha Ca. 34; 2 Freem. 175, pl. 235.
  - (t) Jones v. Stanley, 2 Eq. Ca. Abr. 685, pl. 9.
  - (u) Wigg v. Wigg, 1 Atk. 384.
  - (v) Meynell v. Garraway, Nels. Cha. Rep. 63.
  - (w) Cockes v. Sherman, 2 Freem. 13; and see 2 Ves. 574.
  - (x) Ferrars v. Cherry, 2 Vern. 384; Mertins v. Joliffe, Ambl. 313;

<sup>(423)</sup> See Frost v. Beckman, 1 Johns. Ch. Rep. 288. 301. Blair v. Owles, 1 Munf. 38. And See Lewis v. Maddisons, 1 Munf. 303. Jewett v. Palmer, 7 Johns. Ch. Rep. 65.

<sup>(424)</sup> See Hoover v. Donally, 3 Hen. & Munf. 316.

<sup>(425)</sup> See Wilcox v. Calloway, 1 Wash. Rep. 41.

<sup>(426)</sup> See Jackson v. Givens, 8 Johns. Rep. 105. 2d edit.

<sup>(427)</sup> See Demarest v. Winkoop, 3 Johns. Ch. Rep. 147. Jackson vol. 11. 40 (\*274)

So, on the other hand, a person with notice of an equitable claim, may safely purchase of a person who bought bona fide, and without notice of it(y); although this (\*)circumstance may influence the Court with respect to costs(z)(I). This rule is consistent with the others; it is not in favor of the purchaser with notice, but of the purchaser without notice. If a different rule prevailed, he might not be able to sell the estate(428).

It still remains to show what will be deemed sufficient notice to a purchaser; but the importance of this subject seems to demand a separate chapter.

Lowther v. Carleton, MS. Barnard. Rep. Cha. 358; Forrester, 187; 2 Atk. 242. See Pitts v. Edelph, Toth. 284.

- (y) Harrison v. Forth, Prec. Cha. 51; 1 Eq. Ca. Abr. 331, pl. 6;
  Brandling v. Ord, 1 Atk. 571; Sweet v. Southcote, 2 Bro. C. C. 66;
  2 Dick. 671; Lowther v. Carleton, 2 Atk. 242; Andrew v. Wrigley,
  4 Bro. C. C. 125.
  - (z) Andrew v. Wrigley, 4 Bro. C. C. 125.
- (I) In Grounds and Rudiments of Law and Equity, p. 275, tit. 377, Lord Talbot is erroneously stated to have held in Lowther v. Carleton, that where a purchaser with notice conveys to another without notice, the second sale was vicious, because of the former conveyance being, with notice; and the author of that book warmly espouses the doctrine.

v. Given, 8 Johns. Rep. 105. 2d edit. Bebee v. Bank of New-York, 1 Johns. Rep. 573, 574. See also Lacey v. Wilson, 4 Munf. 313. Jackson v. Henry, 10 Johns. Rep. 185.

<sup>(428)</sup> See Bumpus v. Platner, 1 Johns. Ch. Rep. 213, 219. Alexander v. Pendleton, 8 Cranch, 462.

<sup>(\*275)</sup> 

## (\*)CHAPTER XVII.

OF NOTICE.

Notice is either actual or constructive; but there is no difference between actual and constructive notice in its consequences(a).

I. Of actual notice little can be said. It requires no definition, and it need only be remarked, that, to constitute a binding notice, it must be given by a person interested in the property, and in the course of the treaty for the purchase(429). Vague reports from persons not interested in the property, will not affect the purchaser's conscience; nor will he be bound by notice in a previous transaction which he may have forgotten.

That vague reports from strangers are not notice, was decided in the case of Wildgoose v. Weyland(b), where one man came to a person about to buy a house, and told him to take heed how he bought it, for the vendor had nothing in it, but upon trust for A: and another person came to him, and told him it was not so, for the vendor was seised of the land absolutely. The information of the first proved correct, yet the purchaser was held not to have notice: because such flying reports were many times fables, and not truth; and if it should be admitted for a sufficient notice, then the inheritance of every man might easily be slandered.

- (a) See Ambl. 626.
- (b) Goulds, 147, pl. 67; and Cornwallis's case, Toth. 254.

And not only a mere assertion, that some other person claims a title is not sufficient, but, perhaps, a general (\*)claim is not sufficient to affect a purchaser with notice of a deed, of which he does not appear to have had knowledge(c).

However, no person could be advised to accept a title concerning which there were any such reports, or assertions, without having them elucidated; because what one Judge might think a flying, vague report, or a mere assertion, another might deem a good notice. For instance, in Fry v. Porter(d), Hale, C. B. in speaking of the point of notice in that case (which, however, did not relate to a purchaser), said, "here are several circumstances that seem to show there might be notice, and a public voice in the house, or an accidental intimation, &c. may possibly be sufficient notice" (430).

- (c) See Jolland v. Stainbridge, 3 Ves. jun. 478.
- (d) 1 Mod. 300. See Butcher v. Stapely, 1 Vern. 363,

<sup>(430)</sup> See Currens v. Hart, Harden, 37.

<sup>&</sup>quot;There may be circumstances which throw a duty on the tenant in possession; such for instance as are alleged in this case; a sale of the land by the sheriff, as the property of Procter, whose tenant Covert was said to be, Covert standing by, and not contradicting it. And if Covert did so stand by, knowing that he was represented as Procter's tenant, and not contradicting it, he could not afterwards contest the title of Procter with the purchaser." (Per Tilghman, C. J. in Covert et al. v. Irwin et al. 3 S. & R. 289.)

In Plumer v. Robertson et al. 6 ib. 179., where the defendant Robertson having a mortgage on an estate, entered into articles for the purchase of the premises; and entered into possession. The mortgagee soon after left the country; and the plaintiff having received a deed from the mortgagee, the question arose whether Robertson's claim under the articles ought to be postponed to that of the plaintiff. There were two points on which the cause turned. 1. Had the plaintiff notice of the defendant's agreement; and the charge to the jury was that the possession of R. amounted to constructive notice of the agreement.

2. Were the articles rescinded by his proceedings on scire facius declaring that he held under the mortgage? The Court granted a new (\*277)

That the notice to the purchaser must be in the same transaction, seems to have been settled in a case(e), upon

(e) See East Greenstead's case, Duke, 64; and the cases infra, as to notice to an agent. See 1 Ves. jun. 425.

trial on the ground of error in the charge in respect to constructive notice. The possession, was a circumstance for the jury, but was not ipso facto, a legal presumption of notice. The point on which the cause should have been submitted to the jury, was, whether actual notice of the articles of agreement was given to the plaintiff. If the plaintiff knew that fact, which amounted in equity, to a sale to Robertson, he should not have purchased: if he went on with notice to purchase, it was at his peril.

If the second purchaser has notice of the first conveyance, his purchase is a fraudulent act. This notice may be express or it may be implied from the first purchaser being in the open and exclusive possession of the estate. 2 Mass. 506. The notice to affect a purchaser, should be actual, circumstantial, in the transaction, by the party in interest; for there can be no implied notice: the clear notice required by the law, is actual, has a real form, to be established by direct proof. A purchaser of the legal title cannot be affected by any latent equity of which he has not actual notice, or which does not appear on some deed necessary to the deduction of his title. 1 Wash. 4. The strongest case which can be put, is that of a conveyance registered in the proper county without due proof; yet this is not notice, nor to be left to a jury from which to imply notice. Heister r. Fortner, 2 Binn. 40. It must be proved that he knew exactly the state of the party having the equity, and knowing that, acquired the legal estate. The evidence of notice ought to amount to actual fraud, and must be very clearly proved. The true ground in cases of notice, is, that in itself it is a species of fraud, and takes the bona fides of the purchaser, and puts him in mala fide. In Peebles v. Reading, 8 S. & R. 484, in which these principles were recognized, the case was thus: Reading sued in ejectment for 75 acres of land of which he had been the owner. The land in question was sold by the sheriff to Turner for 71 dollars, when it was worth eight or ten dollars by the acre. The next year Turner moved on to the land; and in the subsequent year Reading moved off. Turner erected buildings, made improvements, and in about six years sold the land to Peebles for twenty dollars per acre, who entered into possession. Turner, the purchaser declared before and after the sheriff's sale, that he had bought for Reading, and would let him have back the estate, if he paid him the money. Peebles, however, never made any

the statute of charitable uses (f), the facts of which were, that land given to charitable uses was intended to be

## (f) Supra, vol. 2. p. 182.

such declaration. The jury under instructions from the court returned a verdict for the plaintiff, the Court in error reversed the judgment and granted a new trial. The Court, Duncan, J. " That the act for the prevention of frauds and perjuries, though copied from the English statute, omits the 7th section respecting trusts. And from the cases of German v. Gabbald, 3 Binn. 304, and Wallace et al. 2 S. & R. 521, it would seem, that the act did not prevent any declaration of trust being made by parol. The provisions of the act, seemed rather to apply to legal than trust estates, and there was nothing to prevent parol proof by which a trust might be inferred; and even did the statute apply in cases of fraud, and where transactions have been carried on mala fide, there is a resulting trust by operation of law. This is not a resulting, within the English statute; for if a man employs another, by parol, as his agent to buy an estate for him, and the agent buys and pays for it with his own money, and takes the conveyance in his own name, it would not be a resulting trust. Bartlett v. Pickersgill, 4 Burr. 2255. In Botsford v. Burr, 2 Johns. Ch. R. 405, resembles this, where it was held that one who sets up such a trust, on a sale of his property on a mortgage, unless he has paid part of the consideration money, will not be allowed to shew by parol, that the purchase was made for his benefit. Though parol evidence is admissible in this state; yet it should be received with caution. But the length of time would amount to a waiver had there been an agreement in writing to reconvey. In Youst v. Martin, 3 S. & R. 429, it is truly said, that a court of equity will not force a man to give up his possession under circumstances of long acquiescence, without reimbursing the money he has paid; or if the improvements be expensive, or the lapse of time great, would he be compelled to give it up at all. Peebles is a purchaser six years after sheriff's deed acknowledged, five years after possession delivered to Turner, with improvements made to five times the amount of the original purchase; and having paid more than seven times the amount of the original purchase money. This trust neither appeared by any writing, nor did the possession continue in the cestut que trust. No notice that is conclusive. And as relief could be granted only on account of Peebles' fraud, and that fraud consisting of a purchase with notice of the trust, it must be made out by clear proof of actual notice. A mere knowledge or report that Turner had declared he had bought for Reading will not do after this lapse of time.

sold by act of parliament, and when the bill was read in parliament, it was declared, that the land was chargeable with a charitable use, and an offer was made to otherwise assure the charitable use. The bill, however, did not pass, and the land was afterwards sold to one of the members of the House, who spoke in the debate on the bill; yet this notice was held not to be sufficient notice, because it was not known to the purchaser, except as a member of parliament.

It may be here proper to mention, that an action on the case for slander of the vendor's title will not lie against a person for giving notice of his claim upon an estate, either by himself or his attorney, at a public auction, or (\*)to any person about to buy the estate; although the sale be thereby prevented(g); and to sustain the action, malice in the defendant must be proved(h).

(g) Hargrave v. Le Breton, 4 Burr. 2422.

(h) Sinith v. Spooner, 3 Taunt. 246. See Rowe v. Roach, 1 Mau.

In Jackson v. Valkenburgh, 8 Cowen, 260, the inquiry was how particular and certain the notice must be, which should be deemed equivalent to a registry? The case there was that the attorney who had directions to obtain an assignment of a mortgage had been informed generally of a prior mortgage: but could find no registry, except the registry of an assignment of the mortgagor's interest in book of deeds, the Supreme Court held, that this was not sufficient notice. That fact alone was not enough to put a party on inquiry. Woodworth, J. said. The notice may have answered to put a person on inquiry, in a case where that species of notice is sufficient; but to supply the place of a registry, the law proceeds a step farther; for if the second mortgage is not registered as bona fide, because, in consequence of notice, it is tainted with fraud, that imputation must be supported by clear evidence. The registry of an absolute conveyance which the attorney found was not sufficient, because here the claim is in the nature of a mortgage, in consequence of the defeasance that accompanied it. It was therefore not sufficient notice of a mortgage. Jolland v. Stainbridge, 3 Ves. 478; Hine v. Dodd, 2 Atk. 275. The case of Jackson v. Burgott, 10 Johns. 457, proceeds on the same ground. Actual notice was held necessarv. So also in Dunham v. Dey, 18 ib. 555. (\*278)

Nor will the action lie against the attorney, although he do not deliver the precise message of his principal, provided it be to the same effect.

- II. Constructive notice, in its nature, is no more than evidence of notice, the presumptions of which are so violent, that the Court will not allow even of its being controverted (i)(431); but it is difficult to say what will amount to constructive notice. The following rules may, perhaps, assist the learned reader in his researches.
- 1. Notice to the counsel, attorney, or agent of the purchaser, is notice to him(k)(432); for otherwise, as Lord Talbot observed, a man who had a mind to get another's estate, might shut his own eyes, and employ another to treat for him who had notice of a former title; which would be a manifest cheat(l). And the same rule prevails, although the counsel, attorney or agent, be the vendor(m)(433), or be concerned for both vendor and purchaser(n).

So notice to the town agent of the purchaser's attorney in the country, is also notice to the purchaser(o).

and Selw. 304; Pitt v. Donovan, ib. 639; Robertson v. M'Dougall, 4 Bingh. 670.

(i) See 2 Anstr. 438; per Eyre, C. B.

- (k) Newstead v. Searles, 1 Atk. 265; Le Neve v. Le Neve, 3 Atk. 646; 1 Ves. 64; Brotherton v. Hatt, 2 Vern. 574; Ashley v. Baillie, 2 Ves. 368; Maddox v. Maddox, 1 Ves. 61; and see 3 Cha. Ca. 110; Tunstall v. Trappes, 3 Sim. 301.
- (l) Attorney-General v. Gower, 2 Eq. Ca. Abr. 685, pl. 11. See Ambl. 626.
  - (m) Sheldon v. Cox, Ambl. 624.
  - (n) Le Neve v. Le Neve, 3 Atk. 646.
  - (o) Norris v. Le Neve, 3 Atk. 26.

<sup>(431)</sup> See Billington v. Welsh, 5 Binn. 132.

<sup>(432)</sup> See Astor v. Wells, 4 Wheat. 466, 487. Jackson v. Sharp, 9 Johns. Rep. 162, 168, 169. and see Blair v. Owles, 1 Munf. 38.

<sup>(433)</sup> See Blair v. Owles, ut supra.

And it is immaterial that the purchase is made under (\*)the direction of a court of equity; and infants are equally bound with adults(p).

And if a person, with notice of any claim, purchase an estate in the name of another, without his consent, yet if he afterwards assent to it, he is bound by the notice to his agent(q). So a man cannot elude the effect of having notice, by procuring the conveyance to be made to a third person(r).

But although, if a man purchase an estate which is subject to an equity only, of which he or his agent has notice, it is a fraud; yet, if an instrument is signed by all parties, the intention cannot be interpreted, contrary to such instrument, by notice to an agent, that some of the parties had such intention(s).

Although the counsel, attorney or agent, be employed only in part, and not throughout the transaction, the purchaser is equally affected by the notice. This was doubted in the case of Vane v. Lord Barnard(t); but in the later case of Bury v. Bury, before Lord Hardwicke(u), he said, "where an agent has been employed for a person in part, and not throughout, yet that affects the person with notice."

The notice to the counsel, attorney or agent, must, however, be in the same transaction; because he may very

<sup>(</sup>p) Toulmin v. Steere, 3 Mer. 210. A petition for rehearing was presented, which was afterwards withdrawn under circumstances not connected with the legal points in the case.

 <sup>(</sup>q) Merry v. Abney, 1 Cha. Ca. 38; 1 Eq. Ca. Abr. 330; 2 Freem.
 151; Nels. Cha. Rep. 59; Jennings v. Moore, 2 Vern. 609; 1 Bro.
 P. C. 244.

<sup>(</sup>r) Coote v. Mammon, 5 Bro. P. C. by Tomlins, 355.

<sup>(</sup>s) See 1 Bro. C. C. 351.

<sup>(</sup>t) Gilb. Eq. Rep. 6. See 2 Pow. Mort. 597, 598, 4th edit.

<sup>(</sup>u) Chan. 11th July 1748, Ms. Appendix, No. 27.
vol. 11. 41 (\*279)

easily have forgotten it(v); and if this were not the rule (\*) of the Court, it would be of dangerous consequence, as it would be an objection against the most able counsel, because of course they would be more liable than others of less eminence to have notice, as they are engaged in a great number of affairs of this kind(x). The same rule of course applies to the purchaser himself. If a man purchases an estate, under a deed, which happens to relate also to other lands not comprised in that purchase, and afterwards purchases the other lands to which an apparent title is made, independent of that deed, the former notice of the deed will not of itself affect him in the second transaction, for he was not bound to carry in his recollection those parts of a deed which had no relation to the particular purchase he was then about, nor to take notice of more of the deed than affected his then purchase(y)(434).

- 2. A public act of parliament binds all mankind; but a private act of parliament is not, of itself, notice to a purchaser(z). And it is conceived, that an act of parliament of a private nature, but made a public act(I), in order that it might be judicially taken notice of, instead of being
- (v) Preston v. Tubbin, 1 Vcrn. 286; Fitzgerald v. Fauconberge, Fitzgib. 297; 2 Eq. Ca. Abr. 682, (D.) n (b.); Warwick v. Warwick, 3 Atk. 291; Worsley v. Earl of Scarborough, 3 Atk. 392; Steed v. Whitaker, Barnard. Cha. Rep. 220; Hine v. Dodd, 2 Atk. 275; Lowther v. Carleton, 2 Atk. 242, S. C. MS.; Ashley v. Baillie, 2 Ves. 368. See 1 Ves. 435.
  - (x) Per Lord Hardwicke, 2 Atk. 242.
- (y) Hamilton v. Royse, 2 Scho. & Lef. 327. Per Lord Redesdale; Mountford v. Scott, 3 Madd. 34.
  - (z) See 2 Ves. 480.

<sup>(</sup>I) This will not happen in future, for it has been resolved that a private act shall not be made a public act; but it may be enacted, that the act shall be printed by the king's printer, and that a printed copy of it shall be evidence.

<sup>(434)</sup> See Murray v. Ballou, 1 Johns. Ch. Rep. 566, 574. (\*280)

specially pleaded, and to save the expense of an attested copy, would not be deemed such a public act as to be, of itself, notice to a purchaser(a).

- (\*)3. Lis pendens is of itself notice to a purchaser(b), unless it be collusive, in which case it will not bind him(c)(435), but it is not of itself notice for the purpose of postponing a registered deed(d)(436).
  - (a) See 3 Bos. & Pull. 578.
- (b) See Toth. 45; Yeavely v. Yeavely, Toth. 227; 3 Cha. Rep. 25; Digs v. Boys, Toth. 254; Culpepper v. Ashton, 2 Cha. Ca. 116. 233; Barns v. Canning, 1 Cha. Ca. 300; Sorrell v. Carpenter, 2 P. Wms. 482; and see 3 P. Wms. 117; Garth v. Ward, 2 Atk. 174; 3 Barnard. Rep. Cha. 450; Worsley v. Earl of Scarborough, 3 Atk. 392; Walker v. Smalwood, Ambl. 676; 5 Co. 47, b.; Hill v. Worsley, Hard. 320; Goldson v. Gardiner, 1 Vern. 459, cited; the Bishop of Winchester v. Paine, 11 Ves. jun. 194.
  - (c) 2 Cha. Ca. 116.
  - (d) 19 Ves. jun. 439.

(436) See Murray v. Ballou, 1 Johns. Ch. Rep. 576.

"In a court of equity, a judgment which is only a general and not a specific lien upon the real estate of the debtor, will be so controlled as to protect the prior equitable rights of third persons against the legal lien of the judgments, and also against purchasers under an execution thereon, chargeable with either actual or constructive notice of such equitable rights. Exparte Howe, 1 Paige's R. 125. Hampson v. Edelen, 2 H. & J. 64. 1 Atkinson on Cov. 512. Where the vendee of the judgment is in the actual possession of the premises, under a contract to purchase, executed prior to the docketing of the judgment, the purchaser at the sheriff's sale will be chargeable with constructive notice of the equitable rights of such vendee, and will take the legal title, subject to the same. Tuttle v. Jackson, 6 Wend. R. 213; Buck v. Hallowway's Devises, 2 J. J. Marsh. R. 189; Chesterman v. Gardner, 5 J. Ch. R. 33; and in such a case, if the whole of the purchase money had been paid at the time of the recovery of the judgment, or had been specifically appropriated to the payment of prior incumbrances on the premises, there could be no doubt that the purchaser at

<sup>(435)</sup> See Murray v. Ballou, 1 Johns. Ch. Rep. 566. Murray v. Finster, 2 Johns. Ch. Rep. 155. Heatley v. Finster, 2 Johns. Ch. Rep. 158. Green v. Slayter, 4 Johns. Ch. Rep. 38. Walker v. Butz, 1 Yeates, 574. And see Wallington v. Howley, 1 Des. 170, in note.

A subpana served, is not, however, a sufficient lis pendens unless a bill be filed(e); but when the bill is filed, the

## (e) Anon. 1 Vern. 318.

the sheriff's sale would be considered in equity as holding the legal title in trust for the original vendee; and upon a proper application to the court of chancery, he would be restrained from prosecuting a suit at law against such vendee, or his assigns to recover the possession of the property. Per the Chancellor in Parks v. Jackson, 11 Wend. R. 442, where it appeared that before the bill in chancery was filed, the persons under whom Parks holds, had made contracts with the owner of the premises, entered into possession and made improvements; but the deeds were executed pendente lite. The question was whether the deeds of conveyance were void on the ground of the lis pendens. The Supreme Court considered the question as settled in the case of Jackson v. Andrews et al. 7 Wend. 152: and that a party not only cannot purchase after the lis pendens; but he cannot carry into effect a purchase made but unexecuted at the time of the filing the bill. The Chancellor also in the Court of Errors voted to affirm the judgment 'upon the legal merits of the case, and considering that the equitable rights of the parties cannot be decided in an ejectment suit.' He remarked that 'as the legal title alone is in question in this suit, it is not necessary to express any definite opinion as to the legal lien of a judgment recovered against the vendor in a prior contract of sale upon the unpaid purchase money. In Pennsylvania, where every equitable as well as legal interest in land is settled by action at law, it has been decided that judgment against a vendor who has contracted to sell but has not received the whole purchase money, is a lien on the vendor's interest; and that a purchaser under such judgment will stand in the place of the vendor, and will be entitled to the unpaid purchase money; and upon payment of the same, will be bound to make a deed to the vendee, according to the original agreement. Fasholt v. Reed, 16 S. & R. 267. In Maryland, on the contrary, it appears to have been held, that the vendee who, subsequently to the recovery of a judgment against his vendor, but without any actual notice thereof, had paid over a balance of the purchase money, and taken a conveyance from such judgment debtor, was in equity entitled to protection against the claim on the part of the judgment creditor, to a legal lien on the premises. Hampson v. Edelen, 2 H. & J. R. 64. The last case, however, shows that a subsequent conveyance from the judgment debtor, in pursuance of his contract, does not at law overreach the judgment by relation, and that the vendee must resort to a court of lis pendens begins from the service of the subpana (437). And the question must relate to the estate, and not merely

equity to protect himself against a sale under the judgment, which would render the conveyance from his vendor, subsequent to the docketing of the judgment, inoperative in a court of law. This was also expressly decided in Butts v. Chinn, in the Court of Appeals in Kentucky, 4 J. J. Marsh. R. 641, where the purchaser at the sheriff's sale was permitted to recover in ejectment, on the ground that the conveyance from the vendor, which was executed after the lien of the judgment attached, although in pursuance of a previous contract, was at law overreached by the subsequent sale under the judgment.' He considered a judgment a legal as well as an equitable lien upon lands contracted to be sold, to the extent of the unpaid purchase money: And that the commencement of a suit in chancery, which is duly prosecuted to a decree, is constructive notice to every person who acquires an interest from the defendant in the subject matter of the suit pendente lite, of the legal and equitable rights of the plaintiff as charged in the bill and established by the decree. Murray v. Ballou, 1 J. Ch. R. 556. Notwithstanding, the judgment of the Supreme Court was reversed: All the Court excepting the Chancellor, voting in favor of the reversal. The rule that any interest acquired in the subject matter of a suit pending the suit, is so far considered a nullity that it cannot avail against the plaintiff's title, was considered inapplicable to the case at bar; for the reason of the rule was, that if it were not applied, there would be no end to any suit, the justice of the court would be evaded, and great hardship and inconvenience to the suitor be introduced. Murray v. Lilburn, 2 J. Ch. 444. 2 Ball. & B. 167: Murray v. Ballou, supra. In the latter case Chancellor Kent says 'to bring home to every purchaser, the charge of actual notice of the suit must, from the very nature of the case, be impracticable.' But 'this reason has no application to a third person, whose interest subsisted before the suit was commenced, and who might have been made a party.' 4 Cowen, 678. The persons in possession had such an interest; for possession itself is such an interest; and entitles the party to a day in court. Senator Seward in delivering his opinion showed the rule and the reasons upon which it was founded: and that no case had been cited, 'in which the rule of lis pendens had been applied to a person who purchases by contract, and enters into possession and in part performs his contract before suit commenced, and then pendente lite without actual notice fulfils his contract and takes a deed for the land.'

(437) See Murray v. Ballou, 1 Johns. Ch. Rep. 576. Jackson v. Dickenson, 15 Johns. Rep. 315.

to money secured upon it(f); but a bill to perpetuate the testimony of witnesses and to establish a will, is a

sufficient lis pendens(g)(438).

To affect a purchaser, it has been said that there ought to be a close and continued prosecution of the lis pendens(h), and this is required by Lord Bacon's rule. In a late case(i), the Master of the Rolls cited the following passage from Lord Nottingham's prolegomena of equity: "The Lord Bacon, in his 12th rule, seems to direct, that if a purchase is made pendente lite, after some long intermission, this case shall differ from the common case. But the rule, though reasonable, is not always observed; for in Martin v. Stiles, 1663, the bill filed in 1640, abated by the death in 1648: a bill of revivor was filed in 1662; and the purchase was in 1651; and yet the purchaser was bound, because now, by relation of the bill of revivor, it (\*)was pendente lite: per Clarendon, Chancellor." This passage was cited as an authority, that a purchaser during the abatement of the suit is bound in like manner as if the suit was in full prosecution. But the learned Judge by whom it was quoted, treated this as a case of great difficulty, notwithstanding the authority of Lord Nottingham. Indeed, the case referred to seems to depend too much on its own circumstances and the times in which it occurred, to serve as a precedent. The Lord Keeper expressly said, that the war and infancy excused the laches. Besides, it appears that the person who came in pendente lite did not claim by purchase for money, but under the will of the person against whom the original bill was

(h) Preston v. Tubbin, 1 Vern. 286.

<sup>(</sup>f) Worsley v. Earl of Scarborough, 3 Atk. 392.

<sup>(</sup>g) Garth v. Ward, 2 Atk. 174.

<sup>(</sup>i) Bishop of Winchester v. Paine, 11 Ves. jun. 194; see Kinsmanv. Kinsman, 1 Taml. 399.

<sup>(438)</sup> See Alexander v. Pendleton, 8 Cranch, 469. (\*282)

filed(k). If the point should ever call for a decision, it will probably turn on the question, whether the plaintiff was guilty of laches in reviving the suit.

Lord Redesdale appears to have held, that although a bill is dismissed, yet a party, purchasing after the dismissal, was a purchaser pendente lite, if an appeal was afterwards brought in the House of Lords, since it was still a question whether the bill was rightly dismissed, and the parties thus having notice, must take subject to all the legal and equitable consequences; but it was not necessary to decide whether such a purchase was by force of the supposed lis pendens made with implied notice of the adverse title(l).

A purchaser pendente lite, on filing his supplemental bill, goes into the Court pro bono et malo, and will be liable to all the costs in the proceedings, from the beginning to the end of the suit(m); and he will not be admitted to examine the justice of a former decree, but will be bound by the prior proceedings (n).

(\*) Relief being sought against a bona fide purchaser who bought pendente lite, without actual notice, is, however, considered a hard case in equity; and although the Court cannot refuse its aid against him, yet the plaintiff is by no means a favorite; and therefore if he make a slip in his proceedings, the Court will not assist him to rectify the mistake(o).

The mere pendency of a suit will not prevent the defendant from selling the property, the subject of the suit, but the purchase will, in no manner, affect the right of the plaintiff, except so far as it may be necessary to go against the purchaser, if he obtain a transfer of the *legal* 

<sup>(</sup>k) Style v. Martin, 1 Cha. Ca. 150.

<sup>(</sup>l) 1 Dow, 31.

<sup>(</sup>m) See 1 Atk. 89; and Gaskell v. Durdin, 2 Ball & Beatty, 167.

<sup>(</sup>n) Finch v. Newnham, 2 Vern. 216.

<sup>(</sup>o) Sorrell v. Carpenter, 2 P. Wms. 482.

estate(p)(439). If, however, the plaintiff have only a defeasible estate, the defendant may exercise his right to put an end to it, notwithstanding the pendency of the suit.—Therefore, if a man make a voluntary settlement, and the person claiming under it file a bill against the settlor, to have the trusts performed, yet the defendant may defeat the plaintiff's right by selling the estate to a purchaser during the pendency of the suit. The same observation applies to a settlement with a power of revocation. The settlor, the defendant, may revoke the settlement, although a suit is depending for carrying it into execution(q).

4. Decrees of the courts of equity are not of themselves notice to a purchaser(r)(440).

This was expressly decided in Worsley v. the Earl of Scarborough(s); in which case it appears, by a manuscript (\*)note of the late Mr. Coxe's to the case of Preston v. Tubbin, in his copy of Vernon, in Lincoln's-Inn Library, that Lord Hardwicke held most decidedly, that decrees were not notice. He said there was no such doctrine, that men were to take notice of the decrees of this Court, though they were to take notice of a lis pendens. In Sorrel v. Carpenter(t), it was said by Lord Chancellor King, that the Court will oblige all to take notice of its

<sup>(</sup>p) Metcalfe v. Pulvertoft, before the Vice-Chancellor, 10th August 1813. See 1 Ves. & Beam. 180; 2 Ves. & Beam. 200.

<sup>(</sup>q) S. C.

<sup>(</sup>r) See Toth. 45; Prac. Reg. Cha. 125; and see Sir Thomas Harvey v. Montague, 1 Vern. 57. 122.

<sup>(</sup>s) 3 Atk. 392; and see Rivers v. Steele, Lib. Reg. U. 128; temp. Lord Hardwicke, referred to by Mr. Coxe. Note, owing to the generality of the reference, I could not find this case in the register's book.

<sup>(</sup>t) 2 P. Wms. 482.

<sup>(439)</sup> See Murray v. Lilburn, 2 Johns. Ch. Rep. 441, 442, 444.

<sup>(440)</sup> But see Watlington v. Howley, 1 Des. 170. Monell v. Law-rence, on appeal, 12 Johns. Rep. 521.

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decrees as much as of judgments. This dictum is frequently quoted as an authority to prove that the decrees of equity are notice to purchasers; but it was only an obiter dictum; and, indeed, as judgments are not of themselves notice to a purchaser, it does not appear to affect the question. At first sight, the case of Wortley v. Birkhead(u), seems to militate against the doctrine, but on examination, it will be found not to disturb it; that case having only settled, that after a decree, and directions to settle the priority of the demands, a puisne incumbrancer cannot take the first incumbrance, and thereby gain a preference to the second: as it would lay a foundation for the greatest collusion and contrivance between the parties to exclude each other.

Decrees, however, which do not put an end to the suit, as decrees to account, are of themselves notice to a purchaser(v); because the *lites pendentes* are not thereby terminated(441).

In Kinsman v. Kinsman(x), a testator, who died in 1780, devised one estate to William for life, remainder to his son, an infant, in tail, and another estate to Simon for life, remainder to his sons in tail. By a decree in 1792, in a creditor's suit, it was directed, that if the personal estate were insufficient for the payment of the debts, (\*)the two estates should contribute thereto in proportion to their respective value; and in 1798, upon further directions, the two estates were ordered to be sold. William's estate was sold, but Simon concealed the title-deeds of the estate devised to him, and consequently it could not be sold for want of a title. In 1798, upon a second set of further directions, the debts were paid out of the pur-

<sup>(</sup>u) 2 Ves. 571.

<sup>(</sup>v) Worsley v. Earl of Scarborough, 3 Atk. 392.

<sup>(</sup>x) 1 Russ. & Myl. 617.

<sup>(441)</sup> See Monell v. Lawrence, on appeal, 12 Johns. Rep. 521.

chase-money for William's estate, and the Master reported what proportion of the debts and costs ought to be borne by Simon's estate. William, who was a daylaborer, took no further step, and died in 1825. Simon being left in possession of the estate devised to him, he and his son sold it in 1824 to a bona fide purchaser, without notice. William's son, shortly after his father's death, filed a supplemental bill, to make the estate sold by Simon bear its share of the burden. The Master of the Rolls made a decree accordingly, stating that at the time of the sale there was plainly a lis pendens, which amounted to an equitable charge. Upon an appeal from this decree by the purchaser from Simon, it was reversed by the present Lord Chancellor, who held that there was not such a litis pendentia at the time when the purchase was made as the purchaser was bound to take notice of.

5. The docketing of judgments is not of itself notice to a purchaser(y); for, as Lord Talbot observed, judgments are infinite(z).

6. Registration of deeds is not of itself notice to a purchaser who was seised of a legal estate at the time of the purchase.

If a man search the register he will be deemed to have notice(a); but if a search is made for a particular period, (\*)the purchaser will not by the search be deemed to have notice of any instrument not registered within that period. This was decided in Hodsgon v. Dean(b), where a mortgagee directed a search to be made by the deputy-register for York from 1794, and the plaintiff's claim to an equi-

<sup>(</sup>y) Snelling v. Squint, 2 Cha. Ca. 47; Greswold v. Marsham, 2 Cha. Ca. 170. See Ambl. 154; Churchill v. Grove, 1 Cha. Ca. 37; 2 Freem. 176.

<sup>(</sup>z) 2 Eq. Ca. Abr. 682, (D.) n. (b).

<sup>(</sup>a) Bushell v. Bushell, 1 Sch. & Lef. 103.

<sup>(</sup>b) 2 Sim. & Stu. 221, affirmed by the Lord Chancellor, July 1825, MS.

table estate arose under a settlement of 1755, registered in that year; and it was held that the limited search excluded the presumption of a general search, and that the mortgagee was not bound by constructive notice of the registered deed.

7. Neither an act of bankruptcy(c), nor a commission of bankruptcy(d), is notice to a purchaser.

Indeed, a decision, that an act of bankruptcy was of itself notice to a purchaser, would have operated as a repeal of the provision in the statute of James, in favor of purchasers from bankrupts. For, as we have already seen, a purchaser, with notice of the act of bankruptcy, cannot take advantage of the statute (e)(I).

Upon the general rule in equity in favor of purchasers, and upon the ground that an act of bankruptcy is not of itself notice to a purchaser, Lord Talbot, in the case of Collet v. De Gols(f), decided, that if a mortgage of a legal estate be made before an act of bankruptcy, and the mortgagee make further advances after the act of bankruptcy, (\*)but without notice, the assignees cannot compel a redemption without payment of all the money advanced, that is, that the mortgagee not having had notice, may make use of his prior legal estate as a protection against the commission of bankruptcy. Upon the same principle Lord Mansfield laid it down, that if an estate

<sup>(</sup>c) Wilker v. Bodington, 2 Vern. 599; Anon. 2 Cha. Ca. 136; Collet v. De Gols, For. 65; and see 4 Burr. 2425; ex parte Knott, 11 Ves. jun. 609; but see p. 581.

<sup>(</sup>d) Hithcox r. Sedgwick, 2 Vern. 156; reversed in Dom Proc. See Journals of the House of Lords, vol. xiv. p. 601; and see 7 East, 161. See also Sowerby r. Brooks, 4 Barn. & Ald. 523, where the Court was not aware of the reversal in D. P. of Hithcox r. Sedgwick.

<sup>(</sup>e) Vide supra, vol. 2, p. 184; and see now 6 Geo. 4, c. 16, s. 81. 83. 85, 86; supra, vol. 2. p. 186.

<sup>(</sup>f) For. 65.

<sup>(</sup>I) Vide supra, s. 3, which states the acts of Parliament.

be purchased without notice of an act of bankruptcy, the purchaser may protect himself by a satisfied term prior

to the act of bankruptcy still standing out(g).

In a case, however, before Lord Redesdale, in which Collet and De Gols was incidentally mentioned, he is said to have observed, that it is now the constant practice for the assignees to compel a redemption on payment only of what was advanced before the bankruptcy. He did not, however, express any opinion on the point(h). In a late case before Lord Eldon(i), in which this question was discussed, but did not call for a decision, his Lordship, in the course of the argument, said, "the case of Collet v. De Gols proves that money advanced after an act of bankruptcy may be tacked and charged upon the estate, notwithstanding the property is taken out of the bankrupt; and it was urged there, that he had nothing to convey by the second mortgage, yet it was held, that though the legal effect of the second mortgage is nothing, the Court will consider it a second incumbrance. The distinction was taken, that a secret act of bankruptcy does not prevent tacking, as a commission issued actually does, that being notice to all the world." In delivering judgment, he observed, "that it was said, the act divests the bankrupt of all his interest, and when the commission follows. it operates by relation from the time the act of bankruptcy was committed: unquestionably it does; and then the person taking the second security really takes nothing; (\*)no interest passing from the bankrupt, and therefore shall not tack. All the cases show that this objection will not do, for then it would have been in vain to discuss whether there is a difference between securities after an act of bankruptcy, and after a commission issued. It follows of necessity that the law [qu. effect] is the same in

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<sup>(</sup>g) 4 Burr. 2425. (h) 1 Scho. & Lef. 152.

<sup>(</sup>i) Ex parte Knott, 11 Ves. jun. 609.

both cases, for the operation of the commission is in either case precisely the same, reducing to dust and ashes the second security."

From these observations Lord Eldon's opinion appears to be, that Collet v. De Gols is still a binding authority. If it should be thought difficult to reconcile the last sentence with what precedes it, that must give way to what is before so clearly expressed. Perhaps, however, Lord Eldon intended merely to say, that though the law is different in these cases, yet the effect of the commission is the same whether it issued previously to the second mortgage, or subsequently to it, but upon a prior act of bankruptcy.

A case came before Lord Erskine, in which the precise point called for a decision. His Lordship considered Lord Eldon and Lord Redesdale as having both expressed their opinion against Collet v. De Gols, and he accordingly overruled it, and decided that a mortgagee could not tack advances subsequent to an act of bankruptcy, although made without notice, and the mortgagee had a prior legal estate(k).

This decision must, it should seem, prevent a purchaser who buys without notice of an act of bankruptcy, from availing himself of a prior legal estate as a protection against the commission; and yet it has always been considered clear, that a purchaser could not in such a case be disturbed. The cases, however, cannot be distinguished. The mortgagee was a purchaser pro tanto, and (\*)he, like a purchaser out and out, relied on his legal estate prior to the act of bankruptcy as a protection against the subsequent commission. But we have seen that it was taken from him.

The decision is open to much observation. It entirely subverts the established rule of equity, that a purchaser

<sup>(</sup>k) Ex parte Herbert, 13 Ves. jun. 183.

without notice shall not be relieved against, and an act of bankruptcy is not of itself notice. It proceeded, too, partly on an opinion attributed to Lord Eldon, but which, it should seem, he never entertained; and it escaped observation, that, as we shall shortly see, it had been decided in the House of Lords, that a mortgage without notice may tack advances subsequently even to a commission of bankruptcy. That case must of necessity overrule all others, and the case of Collet v. De Gols may, therefore, be still thought to be a binding authority.

But where a purchaser claimed the benefit of Sir Samuel Romilly's act(l), a commission issued, although afterwards superseded, or a docket struck, would, by force of the statute, have been constructive notice to him of any prior act of bankruptcy. And now by the 6 Geo. 4, c. 16, s. 83(m), the issuing of a commission shall be deemed notice of a prior act of bankruptcy (provided an act of bankruptcy has been actually committed before the issuing of the commission), if the adjudication shall have been notified in the Gazette, and the person to be affected by such notice may reasonably be presumed to have seen the same.

With respect to a commission of bankruptcy, it was, in Hithcox v. Sedgwick, held by Lords Commissioners Trevor and Hutchins, against Lord Commissioner Rawlinson, (\*)that a commission of bankruptcy was notice to a purchaser; and that case is considered by the Profession as having settled that a commission of bankruptcy is of itself notice(n).

But it appears, that upon appeal to the House of Lords

(m) And see s. 85, 86; and supra, vol. 2. p. 190.

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<sup>(1)</sup> Vide supra, vol. 2. p. 185.

<sup>(</sup>n) See For. 70; 9 Ves. jun. 28; 1 Pow. Mortg. 563, 4th edit.; Cooke's B. L. 628, 2d edit.; Cullen's B. L. 235: 2 Cruise's Dig. 250; ex parte Knott, 11 Ves. jun. 609.

the decree against Sedgwick was reversed, and the estate ordered to be sold, and Sedgwick to be paid the 2,200l. (the money advanced after the commission issued), with interest, costs and charges, as mortgagees are usually allowed; which was of course deciding that a commission of bankruptcy is not of itself notice to a purchaser, and that advances made without notice subsequently to the commission may be tacked to the prior mortgage. In the late Mr. Coxe's copy of Vernon, in Lincoln's-Inn Library, is a note to the case of Hithcox v. Sedgwick (which must have been written before the publication of the Lords Journals), in which he states, that Mr. I. Ord had told him the decree was reversed on appeal to the House of Lords as against Sedgwick, and that he (Ord) found it so said in a note of this case, taken by Lord Trevor, in which he says, the decree was so reversed; and that he was counsel on the appeal for Sedgwick.

8. What is sufficient to put a purchaser upon an inquiry is good notice(o); that is, where a man has sufficient information to lead him to a fact he shall be deemed conusant of it(441a). Therefore, if a man knows that

(o) Smith v. Low, 1 Atk 489; Taylor v. Baker, 1 Dan. 71.

<sup>(441</sup>a) See Green v. Slayter, 4 Johns. Ch. Rep. 38. Sterry v. Arden, 1 Johns. Ch. Rep. 267. Willis v. Bucher, 2 Binn. 466; And see Dey v. Dunham, 2 Johns. Ch. Rep. 182. S. C. on appeal, 15 Johns. Rep. 555.

In Farnsworth v. Childs, 4 Mass. 637, where a second purchaser had read a prior deed of conveyance for the purpose of giving his opinion as to the form of it, the court considered that they were bound to consider him as having knowledge of all the contents of the deed, not being at liberty, as a jury was, to make a different inference. But where the deed had lain by unrecorded for two years, without any apparent change of possession or occupation, the defendant had no reason to presume that the plaintiff's estate remained in him. The creditor's debt was bona fide, and the lands of the grantor were liable to satisfy it. The grantee does not put his deed on record, and for personal reasons, he permits the visible possession and occupation to remain in the grantor: And no reason is assigned why the deed is not

the legal estate is in a third person at the time he purchases, he is bound to take notice what the trust is(p).

## (p) Anon. 2 Freem. 137, pl. 711.

recorded. If the grantee had entered into possession, the notice of the prior conveyance would have been a continuing notice. But when the grantor remains in possession for a long time, during which the grantee might have recorded his deed, but does not do it; it would be unreasonable to defeat the subsequent title of a judgment creditor by imputing to him a fraud; because he might well presume, from the length of time that the deed had remained unrecorded, either that it was not bona fide, or that it had been cancelled, or that the estate had been reconveyed; and if the first purchaser suffers, it is owing entirely to his own neglect. If the grantee had taken visible possession of the estate before the levy or the second purchase, the case would rest on different principles, and would receive a different decision.

Generally the open and notorious possession of the first purchaser under his deed would be sufficient to raise a legal presumption of notice. But where the grantee of a part of a lot of land; he being before owner of the residue, only repaired the fences, put some cattle into the lot and also cut and sold some trees from the part he had purchased; held, that these facts were not sufficient to imply notice. The repairing the fence, setting aside the deed, would have been neither a disseisin nor a trespass. Nor was the depasturing the small strip of improved land; for the tenant had a right to turn his cattle into his own pasture: And as to the cutting the trees, it was but a mere trespass. The deed was not followed by any apparent change in the possession. The possession therefore was hardly sufficient to put a party on inquiry, and is very slight ground for implied notice of a prior deed. M'Mechan v. Griffing, 3 Pick. 149.

A deed was executed and delivered; but before it was recorded, the tenant attached the land: the deed having been executed on the 8th and recorded early in the next morning: held, that the attachment had priority. Parker, C. J. "It is agreed that the attachment was made before the deed was recorded, but not until it was executed and delivered. The case then turns upon the knowledge of the tenant of a title in the demandant, when he caused his attachment to be made. If when he set out to make this attachment, the title to the land had passed from Cushing to the demandant by an actual delivery of the deed, then to intercept him by an attachment before he could, with all due diligence, procure a registry of his deed, might according to the case of Priest v.

So notice that the title-deeds are in another man's possession may be held to be notice of any equitable claim (\*)which he may have on the estate, and as a security for which he held the deeds(q)(442).

This doctrine has been carried so far, that notice that part of the estate was in possession of a tenant hath been holden to be notice of a lease, although the purchaser took it for granted that the tenant was only so from year to year(r)(443). And if the tenant has even changed his

- (q) Hiern v. Mill, 13 Ves. jun. 114.
- (r) See 2 Ves. jun. 440; 13 Ves. jun. 121.

Rice, 1 Pick. 168, be fraudulent, and his attachment would fail. here the deed was only about being made, and this fact the tenant knew. He had a right to try his speed in this case, as much as if the demandant had been about obtaining his security by attachment, and while his writ was preparing, the tenant had procured the first attachment. The principle which is to govern this case, was settled in Warden v. Adams, 15 Mass. 233. It is not the knowledge of an intent to convey or attach, which will prevent the legal effect of an attachment by another creditor, which gets to be first in point of time, but a knowledge of an actual passing the title, which is complete against every one with notice, whether by registry or personal. The reasonable time to get a deed recorded, is applicable only to cases of constructive fraud which may be rebutted by such laches as would give ground to believe the bargain had been rescinded, there being no registry of the deed, and no change of possession in the land conveyed. There is nothing in the position against subsequently attaching creditors, or subsequent purchasers, without notice." Cushing v. Hurd, 4 Pick 253.

(442) The mere circumstance of leaving the title deeds in the hands of the mertgager, is not, of itself, sufficient evidence of fraud, so as to postpone the first mortgagee, to a second mortgagee, who has taken the title deeds, without notice of the first mortgage. Berry v. Mutual Ins. Co. 2 Johns. Ch. Rep 603. So, where a demise is made of a leasehold estate, by way of mortgage, it is unnecessary to deliver the lease itself to the mortgagee; and the possession of it by the mortgagor is no evidence of fraud; because the registry act requiring the registry of mortgages, effectually secures the rights of subsequent purchasers and mortgagees, against fraud. Johnson v. Stagg, on appeal, 2 Johns. Rep. 510.

(443) See Chesterman v. Gardner, 5 Johns. Ch. Rep. 29. vol. II. 43

character by having agreed to purchase the estate, yet his possession amounts to notice of his equitable title as purchaser(s); and consequently a subsequent purchaser, although without actual notice, will be considered as a purchaser of the seller's title, subject to the equity of the tenant, the first purchaser, to have the estate conveyed to him at the price which he had stipulated to pay to the seller. In such a case, therefore, a specific performance will be decreed in favor of the tenant against the seller, and the second purchaser, and they will be left to settle their rights between themselves(t). The cases have gone so far, that a purchaser cannot be advised to complete a contract for an estate not in the seller's own occupation without a communication with the tenants, in order to ascertain what their interests really are. So where a tenant had an interest under an agreement posterior to the lease under which he held, the purchaser was held to be bound by it, although he had not notice of it(u). But a purchaser, where the possession is vacant, is not bound to inquire of the late occupier what was the nature of his title, and therefore would not be held to have (\*)implied notice of the information which he might have obtained by inquiry(v).

Where a man had made an equitable mortgage to A, and upon afterwards giving a security to another person, stated that he had given a judgment or warrant of attorney to A, for money borrowed of him, this was held to be notice of the mortgage(x).

In a late case, where a charity-lease was sought to

<sup>(</sup>s) Daniels v. Davison, 16 Ves. 249; and see Crofton v. Ormsby, 2 Scho. & Lef. 583; Meux v. Maltby, 2 Swanst 181; Powell v. Dillon, 2 Ball & Beatt. 416.

<sup>(</sup>t) 17 Ves. jun. 433.

<sup>(</sup>u) Allen v. Anthony, 1 Mer. 282.

<sup>(</sup>v) Miles v. Langley, 1 Russ. & Myl. 39.

<sup>(</sup>x) Taylor v. Baker, 5 Price, 306. (\*292)

be set aside as improvidently made, upon the common equity, and it appeared that some of the parties stood in the character of purchasers, Lord Eldon said, though the purchaser of a lease has never been considered as a purchaser for valuable consideration, without notice, to the extent of not being bound to know from whom the lessor derived his title, he (Lord Eldon) was not aware of any case that had gone the length that the purchaser was to take notice of all those circumstances under which the lessor derived that title. Therefore, although the parties before the court must be understood at least to have notice that the lessors were trustees for a charity, yet he could not go the length that the purchasers had notice that the lease was bad; that depending on a number of circumstances dehors the lease(y).

But this of course, as in all other cases of notice, only prevails in equity; for although a purchaser has actual notice of a lease, yet if it be invalid, he may at law recover the possession from the lessee(z).

Notice of a tenancy will not, it seems, affect a purchaser with constructive notice of the lessor's title. Therefore, if a person equitably entitled to an estate let it to a tenant (\*)who takes possession, and then the person having the legal estate sells to a person who purchases bona fide and without note of the equitable claim, the purchaser must hold against the equitable owner, although he had notice of the tenant being in possession.

So a purchaser bona fide and without notice cannot be affected by the mere circumstance of the vendor having been out of possession many years. Thus, in a

<sup>(</sup>y) Attorney-General v. Backhouse, 17 Ves. jun. 293. See 3 Ridg. P. C. 512.

<sup>(</sup>z) Doe v. Luffkin, 4 East, 221.

case(a)(I), where A covenanted to surrender lands to uses, which were enjoyed accordingly, although no surrender was made; and A, thirteen years afterwards, surrendered the same lands to B for valuable consideration, without notice of the covenant, B was holden to be entitled to the lands, and the covenantees were left to their remedy at law.

In all cases where a purchaser cannot make out a title but by a deed which leads him to another fact, whether by description of the parties, recital or otherwise, he will be deemed conusant thereof; for it was crassa negligentia that he sought not after it(b)(444); and for the same reason, if a purchaser has notice of a deed he is bound by all

its contents (c)(445).

(a) Oxwith v. Plummer, Bac. Abr. T. Mortgage, (E.) s. 3; 2 Vern. 636, S. C.

- (b) Bisco v. Earl of Banbury, 1 Cha. C. 287; Moore v. Bennett, 2 Cha. Ca. 246; Ferrars v. Cherry, 2 Vern. 384; Drapers' Company v. Yardley, 2 Vern. 662; Mertins v. Joliffe, Ambl. 313; Bury v. Bury, Chancery, 11th July 1748, MS. Appendix, No. 27; and Coppin v. Fernyhough, 2 Bro. C. C. 291; S. P. per Lord Keeper Henley, in Howarth v. Powell, T. Vac. 1758, MS.; 1 Eden, 51, nom Howorth v. Deem; Malpas v. Ackland, 3 Russ. 273.
- (c) Tanner v. Florence, 1 Cha. Ca. 259; Taylor v. Stibbert, 2 Ves. jun. 437; Hall v. Smith, MS. S. C.; 14 Ves. jun. 426; Daniels v. Davison, 16 Ves. jun. 249; which have overruled Phillips v. Redhel,
- (I) From the report in Vernon, it seems that Lord Cowper thought there was no specific agreement to surrender the copyhold to Oxwith; but the report in Bacon is very full and circumstantial.

<sup>(444)</sup> Sec Willis v. Bucher, 2 Binn. 466. A conveyance, with a recital of the intent of the purchase, is a conveyance with notice, and the grantee will take the estate subject to the trusts implied, as well as expressed. Cuyler v. Bradt, 2 Caines' Cas. in Error, 326. But a purchaser of A., a trustee, is not chargeable with notice of a trust, by means of the registry of a deed from B. to C., reciting, that A. had executed a declaration of the trust. Murray v. Ballou, 1 Johns. Ch. Rep. 566.

<sup>(445)</sup> See Irvine v. Campbell, 6 Binn. 119.

(\*) If a man agrees to purchase under limitations in a deed, which makes it necessary upon that transaction for him to look into that deed, and that deed contains recitals of judgments affecting the lands he has so agreed to purchase, he is bound by those judgments, for he had a right to see the whole deed under which he purchased, and therefore must be taken to have seen the whole, and must consequently be presumed to have taken notice of every thing contained in it affecting his purchase (d)(446).

So if an estate be subject to incumbrances, and be given by the owner in consideration of another estate given to him, the latter estate is subject in equity to the incumbrances charged at law on the former, and a purchaser, with notice of the transaction, is liable to the incumbrances although he had not notice of them. This was decided by Lord Redesdale, who considered it sufficient that the purchaser, by notice of the deeds, had notice of the equity, although he had not notice of the particular incumbrance. This he said was an equity of which every purchaser under a settlement must have notice; for it is a clear rule, that a man cannot claim under a deed, and avoid the deed; he must submit to the whole; and he has notice of every thing of which the vendor had notice, so far as concerns that deed(e). This, it may be observed, was an opinion not intended to decide the case, although it was acquiesced in. It carries the rule much farther, it is apprehended, than is warranted by either principle or authority.

<sup>2</sup> Vern. 160, cited; where tenant for life sold as tenant in fee, and the very settlement at the time of the purchase was delivered to the purchaser himself, yet the Court would not affect the purchaser with the presumptive notice, but dismissed the bill.

<sup>(</sup>d) Hamilton v. Royse, 2 Scho. & Lef. 326, per Lord Redesdale.

<sup>(</sup>e) Hamilton v. Royse, 2 Scho. & Lef. 315.

<sup>(446)</sup> See Morris v. Vanderen, 1 Dall. 64. 67.

But where a husband has not performed a marriage agreement on his part, he is not entitled to claim the benefit of it(f), and a purchaser from him of the consideration (\*) for the settlement by the wife, with notice of the deed, will be bound by the same equity as the husband was(g).

But the recital in a deed of a fact, which may or may not, according to circumstances, be held in a court of equity to amount to a fraud, will not, it seems, affect a purchaser for valuable consideration denying actual notice of the fraud(h). Nor will circumstances amounting to a mere suspicion of fraud be deemed notice thereof to a purchaser. This question constantly arises in practice, on sales by tenant for life, and a child to whom he has appointed the estate under an exclusive power of appointment amongst his children. If there was any underhand agreement between the father and son, the power would be deemed fraudulently executed, and the other children might be relieved against it. The difficulty on the part of a purchaser is to ascertain what circumstances, independently of a direct statement of the fact, are sufficient to fix the purchaser with presumptive notice of fraud. Lord Eldon has greatly relieved this difficulty by deciding, that the mere circumstance of the father first contracting to sell the estate, and then appointing to one child, who joins in the sale, will not affect the purchaser where the contract appears to have been fair, and the purchase-money to have been paid to all the parties, and there is nothing to show that the son was not to receive a due proportion of the money(i).

(g) Harvey v. Ashley, 2 Scho. & Lef. 328, cited.

<sup>(</sup>f) Mitford v. Mitford, 9 Ves. jun. 87. See Bascoi v. Serra, 14 Ves. jun. 313.

<sup>(</sup>h) Kenny v. Browne, 3 Ridge. P. C. 512 . See 17 Ves. jun. 293.

<sup>(</sup>i) M'Queen v. Farquhar, 11 Ves. jun. 467; vide supra, vol. 1. p. 353.

Although a term assigned generally in trust to attend the inheritance is equally charged with the inheritance itself, yet such a trust is not of itself notice to a purchaser of any incumbrances; for it is notice of nothing but that (\*)there is an inheritance to be protected, and that the term is attendant. It therefore gives notice to a purchaser of nothing but what he had notice of by the deeds making out the title to the fee.

But if in an assignment it be declared that the term is assigned to attend the inheritance, as limited or settled by such a deed, or to protect the uses of such a settlement, as is sometimes done, that will be notice of the deed or settlement, and consequently of all the uses of it, and the purchaser is bound to find them out at his peril(k).

It has been said that the court-rolls are the title-deeds of copyholds, and a purchaser is affected with notice of the court-rolls, as far back as a search is necessary for the security of the title(l). But this does not accord with the general rule as to judgments, registered deeds, and the like, and would lead to great inconvenience in practice. It frequently happens that purchasers of property of small value accept the title of a great family under the last settlement, and it would be impossible to hold that they were bound by notice of the contents of the early deeds if not referred to by the settlement. A purchaser of a copyhold estate is furnished with an abstract of the surrenders and admissions, and requires copies of the material ones; but, in point of fact, the court-rolls are scarcely ever searched by a purchaser, and it has always been understood, in practice, that he is not bound by notice of their contents.

9. The better opinion seems to be, that being a witness to the execution of a deed will not of itself be notice; for

<sup>(</sup>k) Willoughby v. Willoughby, 1 T. Rep. 763; 1 Col. Jurid. 337.

<sup>(1)</sup> Pearce v. Newlyn, 3 Madd. 186.

a witness, in practice, is not privy to the contents of the

deed(m).

(\*)This question has hitherto only occurred between a first mortgagee, who witnessed a second mortgage, and the second mortgagee; but it might arise between a purchaser who had, previously to his purchase, attested the execution of a deed relating to the estate, and the person in whose favor the deed was executed.

Lastly, it remains to consider, whether a purchaser is bound to take notice of the mere construction of words which are uncertain in themselves, and often depend on the locality of them for the interpretation which they may receive.

This question arises where a settlement is made in pursuance of articles; but the estate is, contrary to the intention of the parties, limited so as to enable the parent to dispose of it. It is clear that the Court will rectify the settlement according to the intention, in favor of the issue, as between themselves, or as between themselves and persons claiming under the parent without consideration; but this has never yet been done against a purchaser (n).

In Senhouse v. Earle(o), Lord Hardwicke drew a distinction between ancient articles of this sort and modern ones, and expressed his opinion, that in the case of ancient articles the purchaser should not be disturbed, because modern methods of conveyancing were not to be construed to affect ancient notions of equity; but in

<sup>(</sup>m) Mocatta v. Murgatroyd, 1 P. Wms. 393; Editor's and Cox's notes, ibid.; Welford v. Beezley, 1 Ves. 6; Beckett v. Cordley, 1 Bro. C. C. 357. See 1 Ves. jun. 55; and see Harding v. Crethorn, 1 Esp. Ca. 56; Holmes v. Custance, 12 Ves. jun. 279; Biddulph v. St. John, 2 Scho. & Lef. 521; Reed v. Williams, 5 Taunt. 257; 6 Dow, 224.

<sup>(</sup>n) Warrick v. Warrick, 3 Atk. 291.

<sup>(</sup>o) Ambl. 285.

<sup>(\*297)</sup> 

case of notice of modern articles, he thought the Court ought to carry them into execution against a purchaser. But in a later case(p), Lord Northington seemed rather of opinion that no relief should be granted against a purchaser; (\*)but this case is not satisfactory, as the language attributed to the Chancellor, on the principal question in that case, is by no means consistent with the prior cases on the subject.

Under these circumstances, a purchaser cannot be advised to accept a title depending on a settlement made in pursuance of articles, but not framed according to the general rules of equity(q); and, certainly, a court of equity would not enforce a purchaser to take such a title, although no relief might be granted to his prejudice if he actually had purchased.

III. Having endeavored to show what will be deemed notice, either actual or constructive, we are now to inquire what will be sufficient proof of such notice.

It seems that the counsel, attorney or agent of the purchaser, cannot be admitted to prove notice (447).

In Maddox v. Maddox(r), the reading of the deposition

- (p) Cordwell v. Mackrill, Ambl. 515; and see Hardy v. Reeves, 4 Ves. jun. 466; 5 Ves. jun. 426; Parker v. Brooke, 9 Ves. jun. 583; and Matthews v. Jones, 2 Anstr. 596.
  - (q) See Fearne's Posth. 315.
- (r) 1 Ves. 62; and see Bishop of Winchester v. Fournier, 2 Ves. 445.

<sup>(447)</sup> See Blair v. Owles, 1 Munf. 38. contra. Every agent is a competent witness, ex necessitate. Mackay v. Rhinclander, 1 Johns. Cas. 408. Jones v. Hake, 2 Johns. Cas. 60. Abbot v. Sebor, 3 Johns. Cas. 47. Stewart v. Kip, 5 Johns. Rep. 256. Cortes v. Billings, 1 Johns. Cas. 270. Alston v. Jones, 1 Murph. 45. Ried v. Colcock, 1 Nott & M'Cord, 592. Connelly v. Chiles, 2 Marsh. Ken. Rep. 242. Kirkpatrick v. Cisna, 3 Bibb, 244. Alexander v. Emerson, 2 Litt. 27. Phillips v. Bridge, 11 Mass. Rep. 242.

of the agent of the purchaser, who swore, in proof of notice, that the deeds were laid before counsel, who made objections about the plaintiff's title, was objected to; but Lord Hardwicke said, that though an attorney or counsel concerned for one of the parties may, if he pleases, demur to his being examined as a witness, yet if he consents, the Court will not refuse the reading his deposition. This objection, he added, had often been made; and though some particular Judges had doubted, it was then always over-ruled. And, on investigation, it will, I believe, be found that Lord Hardwicke invariably adhered to this opinion. But it was settled before Lord Hardwicke's time(s), and has been the observed rule of the Courts (\*) ever since (t), that counsel and attornies ought not to be permitted to discover the secrets of their clients, though they offer themselves for that purpose, and this is the privilege of the client, not of the counsel or attorney(I); for it is contrary to the policy of the law to permit any person to betray a secret with which the law has intrusted him(448).

But a communication by mistake to a person not actually an attorney, although considered so by the person making it, is not protected (u)(449); and an attorney may

- (s) Lord Say and Seal's case, 10 Mod. 41. See Lee v. Markham, Toth. 110; and Anon. Skin. 404.
- (t) Lindsay v. Talbot, Bull. N. P. 284; Wilson v. Rastall, 4 Term Rep. 753; and see 2 Esp. N. P. 716; Wright v. Mayer, 6 Ves. jun. 280; Sloman v. Herne, 2 Esp. Ca. 695; Robson v. Kemp, 5 Esp. Ca. 52; Brand v. Ackerman, ib. 119; Rex v. Withers, 2 Camp. 578; Parkhurst v. Lowten, 2 Swanst. 194.
  - (u) Fountain v. Young, 6 Esp. Ca. 113.

<sup>(</sup>I) This was insisted upon in the reasons in Radcliffe r. Fursman, in the year 1730. See printed cases, Dom. Proc.

<sup>(448)</sup> See Mills v. Griswold, 1 Root, 383. Riggs v. Denniston, 3 Johns. Cas. 198, 202; et seq. And see Clay v. Williams, 2 Munf. 105.

<sup>(449)</sup> See Andrews v. Solomon, 1 Peters' Rep. 359. (\*299)

give evidence of the time of executing a deed, for a thing of such a nature cannot be called the secret of his client, it is a thing he may come to the knowledge of without his client's acquainting him, and is of that nature that an attorney concerned, or any body else, may inform the Court of (v)(450).

So, if an attorney put his name to an instrument as a witness, he makes himself thereby a public man, and no longer clothed with the character of an attorney; his signature binds him to disclose all that passed at the time respecting the execution of the instrument; but not what took place in the preparation of the deed, or at any other time, and not connected with the execution of it. Every person who claims an interest in the property, has a right to call upon the attorney, as being the attesting witness(x); nor does this privilege extend to communications (\*)from collateral quarters, although made to him in consequence of his character of attorney; the privilege is restricted to communications, whether oral or written, from the client to his attorney(y), but it is not necessary that a cause should have commenced(z)(451).

If notice be only proved by one witness, a positive and express denial by the answer will prevent the Court from decreeing against the answer(a)(452): for in equity the

(v) Lord Say and Seal's case, 10 Mod. 41.

- (x) Robson v. Kemp, 5 Esp. Ca. 52; Doe v. Andrews, Cowp. 845.
- (y) Spenceley v. Schulenburgh, 7 East, 357.
- (z) Clark v. Clark, 2 Mood. & Malk. 3.

(a) Alam v. Jourdon, 1 Vern. 161; 3 Cha. Ca. 123; Kingdome v. Boakes, Prec. Cha. 19; Mortimer v. Orchard, 2 Ves. jun. 243; and see Evans v. Bicknell, 6 Ves. jun. 174; 3 Cha. Ca. 123; Dawson v. Massey, 1 Ball & Beatty, 234; Cooke v. Clayworth, 18 Ves. 12.

<sup>(450)</sup> See Baker v. Arnold, 1 Caines' Rep. 258.; and note a.

<sup>(451)</sup> See Hoffman v. Smith, 1 Caines' Rep. 157.

<sup>(452)</sup> See Smith v. Brush, 1 Johns. Ch. Rep. 459, 461, 462. Bright's heir v. Huggin, Hardin, 536. Heffner v. Miller, 2 Munf. 43.

general rule is, that if the answer contains a positive denial of the case stated in the bill, and it is contradicted by one witness only, there cannot be a decree against the defendant, unless the circumstances so preponderate, that greater credit, upon the testimonies of both being fairly balanced, must be given to the depositions of the witness than to the answer of the defendant; laying aside all recollection that the oath of one of the parties is that of an interested person(b).

But where it is not a positive denial of the same fact, but admits of a difference, that it is only a denial with respect to himself, whereas in other respects it will equally affect him, there are several cases where the Court, on one undoubted witness, would decree against the answer; for instance, a person denying only personal notice is a negative pregnant, that still there may be notice to his agent, which is a fact equally material (c)(453).

And where the answer is not ad idem, the charge being positive, and the answer only to belief, which is not suffi-

<sup>(</sup>b) Per Lord Eldon, East India Company v. Donald, 9 Ves. jun. 275; 1 Smith, 213.

<sup>(</sup>c) See 1 Ves. 66; 3 Atk. 650.

Maupin v. Whiting, 1 Call, 224. Pryor v. Adams, 1 Call, 390. Beatty v. Smith, 2 Hen. & Munf. 395. See also 9 Cranch, 160. Sullivan v. Bates, 1 Litt. 42. M'Dowel v. Teasdale, 1 Des. 459. Neufville v. Mitchell, 1 Des. 480. Clark's Admrs. v. Van Reimsdyk, 9 Cranch, 153, 156. Clason v, Morris, on appeal, 10 Johns. Rep. 524. Zylstra v. Keith, 2 Des. 140. But an answer, though in form responsive to a question put in the bill, is not evidence, where it asserts a right affirmatively, in opposition to the plaintiff's demand; but the defendant is as much bound to establish such assertion by independent testimony, as the plaintiff is to sustain his bill. Paynes v. Coles, 1 Munf. 373. See Hart v. Ten Eyck, 2 Johns. Ch. Rep. 62. See also, 1 Johns. Dig. 225. pl. 514. And see note a in Hart v. Ten Eyck, 2 Johns. Ch. Rep. 91.

<sup>(453)</sup> An evasive answer, though no exception be taken, will be out-weighed by the testimony of one witness, connected with corroborative circumstances. Wilkins v. Woodfin, 5 Munf. 183.

cient (\*)to contradict what is positively sworn, a single witness will be sufficient (d).

So where there are a great many concurring circumstances, that strengthen and support the depositions of a single witness, his evidence alone will enable the Court to decree against the answer(e)(454).

If the evidence is not clear enough to enable the Court to make a satisfactory decree, it will be sent to law to be tried(f), unless the value of the property will not admit of it(g)(455).

But the same rule that would absolutely prevent a decree from being made will restrain the Court from directing an issue(h); for the matter is only referred to law, to know what a court of equity ought to do(i); and sending it to law to be tried, where the jury will certainly find it on the testimony of one witness, and then decreeing it on that verdict, is the same thing as decreeing on one witness, without trying it at all(k).

Formerly, an issue used to be directed, although upon the evidence a decree could not be  $\mathrm{made}(l)$ , and in such

- (d) See 1 Ves. 97; and see Pilling v. Armitage, 12 Ves. jun. 78.
- (e) Walton v. Hobbs, 2 Atk. 19; Anon. 3 Atk. 270; Only v. Walker, 3 Atk. 407; Pember v. Mathers, 1 Bro. C. C. 52; East I. C. v. Donald, 9 Ves. jun. 275; 1 Smith, 213; and see 6 Ves. jun. 40; Biddulph v. St. John, 2 Scho. & Lef. 521.
  - (f) Arnot v. Biscoe, 1 Ves. 95.
  - (g) Jolland v. Stainbridge, 3 Ves. jun. 478.
  - (h) Pember v. Mathers, 1 Bro. C. C. 52.
  - (i) See 1 Bro. C. C. 53, 54; 9 Ves. jun. 284; 1 Smith's Rep. 219.
  - (k) See 1 Eq. Ca. Abr. 229, pl. 13.
- (l) Stadd v. Cason, Toth. 230; Ibbotson v. Rhodes, 2 Vern. 554; 1 Eq. Ca. Abr. 229, pl. 13, S. C.; Cant v. Lord Beauclerk, 3 Atk. 408, cited; sed vide Christ College v. Widdington, 2 Vern. 283.

<sup>(454)</sup> See Hart v. Ten Eyck, 2 Johns. Ch. Rep. 92.

<sup>(455)</sup> See Waters v. Travis, 9 Johns. Rep. 450, 457.

cases the defendant's answer was to be read at the trial, not as evidence, for that could not be, nor was it to be admitted to be true, but to be sworn, so that the defendant might have the benefit of his oath at law as well as (\*)in equity, if it would have any weight with the jury. But this could only be done where it was merely oath against oath(m); and as an issue would not now be directed in such a case, the answer of the defendant cannot, it should seem, at the present day, be directed to be read at a trial at law. But if a bill is filed for a discovery only, the answer of the defendant may of course be read on the trial(n).

It must be remarked, that if the notice arise by construction of equity on a deed which is in the possession of the purchaser(o), and he contend that it did not come into his custody till after the completion of his purchase, the proof thereof will lie on him(p).

In one case (q), however, although the only evidence of the deed being in the possession of the defendant was the discovery in his answer, and on the deed being produced the counsel offered to read the answer, to show that it had not been delivered to him till lately, and long after he had purchased the estate, Lord Hardwicke refused it, although it was argued to be very hard; because the only account of the delivery of the deed was in the answer; and by its not being permitted to be read the deed must be taken to be in his custody at the time of the purchase, ten years before it actually was.

But it seems, that the defendant had sufficient notice,

<sup>(</sup>m) Only v. Walker, 3 Atk. 407.

<sup>(</sup>n) See 9 Ves. jun. 282; 1 Smith, 218.

<sup>(</sup>o) See 1 Ves. 392.

<sup>(</sup>p) See 2 Ves. 486.

<sup>(</sup>q) Mertins v. Joliffe, Ambl. 311. (\*302)

besides the mere custody of the deed. His conveyance recited all the former deeds; and therefore reading the answer, to prove when the deed in question came into his custody, was perfectly unnecessary. This case, therefore, cannot be deemed subversive of the general rule.

# (\*)CHAPTER XVIII.

OF PLEADING A PURCHASE.

"Supposing a plaintiff to have a full title to the relief he prays, and the defendant can set up no defence in bar of that title, yet if the defendant has an equal claim to the protection of a court of equity to defend his possession, as the plaintiff has to the assistance of the Court to assert his right, the Court will not interfere on either side. This is the case where the defendant claims under a purchase for valuable consideration, without notice of the plaintiff's title, which he may plead in bar of the suit"(a).

The principle of this plea, Lord Eldon observes, is this: "I have honestly and bona fide paid for this estate, in order to make myself the owner of it; and you shall have no information from me as to the perfection or imperfection of my title until you deliver me from the peril in which you state I have placed myself in the article of purchasing bona fide" (b).

This plea is a peremptory plea, and must be sworn by the pleader(c)(456). It must be put in ante litem contestatam, because it is a plea why an answer should not be put in; and, therefore, if a defendant answers to any

<sup>(</sup>a) Mitford on Pleading, 2d edit. p. 215; Gough v. Stedman, Finch, 208.

<sup>(</sup>b) See Wallwyn v. Lee, 9 Ves. jun. 24.

<sup>(</sup>c) Marshall v. Frank, Prec. Cha. 480.

<sup>(456)</sup> See Snelgrove v. Snelgrove, 4 Des. 286.

<sup>(\*303)</sup> 

thing to which he may plead, he over-rules his plea(d)(457) but he (\*)may answer any thing in subsidium of his plea, as he may deny notice in his answer, which he may deny also in his plea; because that is not putting any thing to issue which he should cover by his plea from being put in issue, but it is adding, by way of answer, that which will support his plea, and not an answer to a charge in the bill, which by the plea he would decline(e).

But the purchaser must protect himself by plea, for if he answer, he is bound to answer fully.

The plea must state the deeds of purchase, setting forth the dates, parties and contents briefly, and the time of their execution(I), for that is the peremptory matter in bar(f)(II)(458).

It must aver that the vendor was seised, or pretended to be seised at the time he executed the conveyance (g)(459).

- (d) Richardson v. Mitchell, Sel. Cha. Ca. 51; Blacket v. Langlands, 1 Anstr. 14.
  - (e) Gilb. For. Rom. 58. See Hoare v. Parker, 1 Bro. C. C. 573.
- (f) See Gilb. For. Rom. 58; Aston v. Aston, 3 Atk. 302; and 2 Ves. 107, 396; and see Wallwyn v. Lee, 9 Ves. jun. 24.
- (g) Story v. Lord Windsor, 2 Atk. 630; Head v. Egerton, 3 P. Wms. 279; and see 17 Ves. jun. 290; Jackson v. Rowe, 4 Russ. 514.
- (I) Qu this, as the plaintiff might thereby be enabled to proceed against the defendant at law. See Anon, 2 Cha. Ca. 161. In Day v. Arundel, Hard. 510, it was expressly held that the time of the purchase need not be stated in the plea.
- (II) It seems, that the practice formerly was, to extend the plea to the discovery even of the purchase-deeds; and in Watkins v. I!atchet, 1 Eq. Ca. Abr. 33, pl. 3, although the purchaser improvidently offered to produce his purchase-deeds, yet the Court would not bind him to do so.

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<sup>(457)</sup> See Snelgrove v. Snelgrove, ut supra.

<sup>(458)</sup> See Snelgrove v. Snelgrove, 4 Des. 286.

<sup>(459)</sup> See 4 Des. 287.

In Carter v. Pritchard(h) it was held, that the plea of a purchase without notice must aver the defendant's belief that the person from whom he purchased was seised in fee. If it be charged in the bill that the vendor was only tenant for life, or tenant in tail, and a discovery of the (\*)title be prayed, such a discovery cannot be covered, unless a seisin is sworn in the manner already mentioned, or that such fines and recoveries were levied and suffered as would bar an entail if the vendor was tenant in tail; for if a purchase by lease and release should be set forth, which would pass no more from the tenant in tail than it lawfully may pass, and that is only an estate for the life of the tenant in tail(I), then there is no bar against the issue(i). Where, however, a fine is pleaded, the plea must aver an actual seisin of a freehold in the vendor, and not that he was seised, or pretended to be seised(k).

If the conveyance pleaded be of an estate in possession, the plea must aver that the vendor was in possession at the time of the execution of the conveyance (l). And if it be of a particular estate, and not in possession, it must set out how the vendor became entitled to the reversion (m). But although a bill be brought by an heir,

<sup>(</sup>h) Michael. Term, 12 Geo. 2, 1739; 2 Vivian's MS. Rep. 90, in Lincoln's Inn Library; see Jackson v. Rowe, 4 Russ. 514.

<sup>(</sup>i) Gilb. For. Rom. 57.

<sup>(</sup>k) Story v. Lord Windsor, 2 Atk. 630; and see Paige v. Lever, 2 Ves. jun. 450; Dobson v. Leadbeater, 13 Ves. jun. 230.

<sup>(1)</sup> Trevanian v. Mosse, 1 Vern. 246; and see 3 Ves. jun. 226; and 3 Ves. jun. 32.

<sup>(</sup>m) Hughes v. Garth, Ambl. 421.

<sup>(</sup>I) This is the doctrine of Littleton, with which, it seems, Gilbert agrees; but since Littleton's time it has been held, that the releasee has a base fee determinable by the entry or action of the issue. See Butler's n. (1) to Co. Litt. 331, a. and the authorities there referred to. But now estates tail may be barred by deed, 3 & 4 Will. 4, c. 74. (\*305)

the plea need not, on that account, aver the purchase to be from the plaintiff's ancestor(n).

The plea must also distinctly aver that the consideration-money mentioned in the deed was bona fide and truly paid(o)(460), independently of the recital of the purchase-

- (n) Seymour v. Nosworth, 2 Freem. 12S; 5 Ch. Rep. 23; Nels. Cha. Rep. 135.
  - (o) Moor v. Mayhow, 1 Cha. Ca. 34. See 2 Atk. 241.

### (460) See 4 Des. 287.

The point decided in Wilkinson v. Scott, 17 Mass. 249, was, that an action would lie in favor of the grantor against the grantee to recover a part of the consideration, although he expressly acknowledged in the deed that he had received the consideration: on the ground that to consider the acknowledgment as conclusive evidence of the fact, injustice might be done. The case did not show an intent to contradict the deed, but merely to shew a mistake in giving security for the consideration. The consideration is known to be arbitrary and is frequently different from the real consideration of the bargain. (14 Johns. 210.) 'It is so, we think also with regard to the acknowledgment of payment. It is but a receipt which is always open to explanation, though under seal.'

In the subsequent case of Griswold v. Messenger, 6 Pick. 517, where the case was very similar; except in the latter case the parol evidence was offered to show that the true consideration was a promise on the part of the defendant to convey the same land to a third person; and upon his refusal so to do, the action was sued to recover the value: the court overruled the evidence and rendered judgment for the defendant.

The distinction therefore, would seem to be, that where a particular consideration is expressed, no other consideration can be averred, but any consideration not inconsistent with that expressed in the deed may be averred, and the true consideration shown, when the object is not to invalidate the deed. Morse v. Shattuck, 4 n. H. R. 229; Jackson v. Pike, 9 Cowen, 69. S. P. A party is precluded denying any consideration, but not the amount or nature of it. Belden v. Seymour et al., 6 Conn. R. 304.

Whether the consideration expressed in a deed is conclusive and not to be controverted by parol evidence has been the subject of some diversity of decision. In Jackson v. Howell. 4 Cowen, 427, Savage, C. J. said 'it is settled that where there is a consideration stated in a deed, and it is not said for other considerations, you cannot enter into

proof of any other, for that would be contrary to the deed.' And Richardson, C. J. (4 N. H. R. 229) 'It is well settled as a general rule that in a court of law, when a consideration is expressed to have been paid in a deed made for the purpose of conveying land, the law will permit no averment to the contrary. When a particular consideration is expressed, no other consideration can be averred, but any consideration not inconsistent with that expressed in the deed may be averred, and the true consideration shown, when the object is not to invalidate the deed.' And parol proof is admissible, when it is in corroboration of the consideration.' Per Savage, C. J. 9 Cowen, 69. And Tilghman, C. J. in 10 S. & R. 329. It is clear, beyond doubt, that any consideration, not contradictory of that which is mentioned in the deed, may be averred, and proved by parol evidence. Where a conveyance is made by deed of bargain and sale, for a consideration of money, it may be averred, that there was also a consideration of natural love and affection, in consequence of which, the deed may operate by way of covenant to stand seised. In the case before us, where the deed is, in form a bargain and sale, in consideration of money, the land passes by bargain and sale, and parol evidence would be inadmissible for the purpose of showing, that there was no consideration of money. That would be in direct contradiction of the deed, and would defeat its operation. But, that besides the consideration of money, there was a consideration of advancement to the daughter of the bargainer, and that the true intent of the parties was, to convey to the husband, several tracts of land, valued altogether at \$1000, for which he was to pay but \$200, after the death of the father, and the remaining \$500, was to be considered as an advancement to the daughter' And Johnson, J. in Garrett v. Stewart, 1 M'Cord, 514, 'Legitimate considerations are either good or valuable and after some attention to the subject my mind inclines to the conclusion that the distinction is, that where one of these is expressed, parol evidence cannot at law be permitted to show the other, but that it may be admitted to show a greater or less of the same character. This is different from the principle laid down in Hyne's Representative v. Campbell, 6 Munroe's R. 286, where the court say some authorities have gone so far; where consideration alone is stated, as to allow averment and proof of another additional consideration. Whether this last position is tenable, is by some decisions rendered questionable. But the additional consideration proved must be of a different character or quality, and not a mere increase; such as when the conveyance said one dollar, to add thereto by inferior proof one thousand.

The better opinion, however, is, that a further or larger consideration than the one expressed in the deed may be proved by parol evidence.

deed(p)(461); for if the money be not paid, the plea will be (\*)overruled(q)(462), as the purchaser is entitled to relief against payment of it(r)(463). The particular consideration must, it should seem, be stated(s), although this

- (p) Maitland v. Wilson, 3 Atk. 814.
- (q) Hardingham v. Nicholls, 3 Atk. 304.
- (r) See supra, vol. i. p. 554.
- (s) Millard's case, 2 Freem. 43; and Snag's case, cited ibid.; and see Wagstaff v. Read, 2 Cha. Ca. 156.

Thus, in Belden v. Seymour, 8 Conn. R. 304, which was covenant in respect to a conveyance of land: and the consideration acknowledged in the deed was \$1800. The plaintiff proposed to prove that the consideration was in fact \$2.500; but the evidence was not admitted at the trial. But upon a motion for a new trial, Paggett, Peters & Williams, Justices considered that the evidence was admissible. The former judge commented upon the cases cited from Johnson's Reports, viz. 1 Johns. 139; 3 ib. 506; 7 ib. 341; and the cases of Bradley et al. v. Blodgett, Kirby's R. 22; Northerp v. Speary, 1 Day's R. 23; and concluded 'that the purpose of the acknowledgment and receipt in a deed is to prevent a resulting trust in the grantor; and that it is merely nominal.' The Chief Justice dissented, considering the consideration expressed in the deed to be conclusive.

In Shepherd v. Little, 14 Johns. 210, it was held, that assumpsit would lie to recover the consideration money of land sold. And where the payment or the amount of the consideration becomes a material inquiry; parol evidence is admissible to show that it has not been paid. Bowen v. Bell, 20 Johns. 338. 'When one species of consideration is expressed, another, or different one, cannot be proved, neither can parol proof be admitted substantially to vary or contradict a written contract.' Per Woodworth, J. ibid. But the Court, Parker, C. J. in Bullard v. Briggs, 7 Pick. p. 537, says, 'The consideration proposed to be proved is different from that which is expressed in the deed, and it is objected that the deed is conclusive upon this point; but we think it has been reasonably settled, that this matter is open to evidence. More or less than is expressed in a deed may be proved by parol evidence as the consideration, and even a different consideration, if valuable, may be proved.'

<sup>(461)</sup> See 4 Des. 287.

<sup>(462)</sup> See 4 Des. 287; and see Murray v. Finster, 2 Johns. Ch. Rep. 157.

<sup>(463)</sup> See 4 Des. 287.

point has been decided otherwise(t)(464). There can, however, be no objection to state the consideration, as, if it be valuable, the plea will not be invalidated by mere inadequacy(u)(465). The question is not whether the consideration is adequate, but whether it is valuable. For if it be such a consideration as will not be deemed fraudulent within the statute of 27th Elizabeth, or is not merely nominal(x), or the purchase is such a one as would hinder a puisne purchase from overturning it, it ought not to be impeached in equity.

The plea must also deny notice of the plaintiff's title or  $\operatorname{claim}(y)(466)$  previously to the execution of the deeds and payment of the purchase-money(z); for till then the transaction is not complete; and, therefore, if the purchaser have notice previously to that time he will be bound by  $\operatorname{it}(a)$ . And the notice so denied must be notice of the existence of the plaintiff's title, and not merely notice of the existence of a person who could claim under that  $\operatorname{title}(b)$ . But a denial of notice at the time of making the purchase, and paying the purchasemoney, (\*) is  $\operatorname{good}(467)$ ; and notice before the purchase

- (t) Moor v. Mayhow, 1 Cha. Ca. 34; Day v. Arundell, Hard. 510.
- (u) Basset v. Nosworthy, Finch, 102; Ambl. 767; Mildmay v. Mildmay, Ambl. 767, cited; Bullock v. Sadlier, Ambl. 764.
- (x) See Moor v. Mayhow, 1 Cha Ca. 34; Wagstaff v. Read, 2 Cha. Ca. 156.
- (y) Lady Bodmin v. Vendebendy, 1 Vern. 179; Anon. 2 Ventr. 361, No. 2.
- (z) Moor v. Mayhow, 1 Cha. Ca. 34; Story v. Lord Windsor, 2 Atk. 630; Attorney-General v. Gower, 2 Eq. Ca. Abr. 685, pl. 11.
  - (a) Vide supra, vol. ii. p. 274.
- (b) Kelsall v. Bennett, 1 Atk. 522; which has overruled Bramton v. Barker, 2 Vern. 159, cited.

<sup>(464)</sup> See 4 Des. 287.

<sup>(465)</sup> See 4 Des. 287.

<sup>(466)</sup> See 4 Des. 287.

 <sup>(467)</sup> See 4 Des. 287. Murray v. Finster, 2 Johns. Ch. Rep. 155,
 157. 4 Des. 287.
 (\*307)

need not be denied, because notice before is notice at the time of the purchase, and the party will, in such case, on its being made appear that he had notice before, be liable to be convicted of perjury(c).

The notice must be positively and not evasively denied(d), and must be denied, whether it be or be not charged by the bill(e)(468). If particular instances of notice, or circumstances of fraud, are charged, the facts from which they are inferred must be denied as specially and particularly as charged(f)(469).

But he need only by this plea deny notice generally (g), unless where facts are specially charged in the bill as evidence of notice (h).

Notice must also be denied by answer, for that is matter of fraud, and cannot be covered with the plea, because the plaintiff must have an opportunity to except to its sufficiency if he think  $\operatorname{fit}(i)(470)$ ; but it must also be denied by the plea, because otherwise there is not a complete plea in court on which the plaintiff may take issue(k)(471).

- (c) Jones v. Thomas, 3 P. Wms. 243.
- (d) Cason v. Round, Prec. Cha. 226; and see 2 Eq. Ca. Abr. 682, (D.) n. (b).
- (e) Aston v. Curzon, and Weston v. Berkely, 3 P. Wms. 244, n. (f); and see the 6th resol. in Brace v. Duke of Marlborough, 2 P. Wms. 491.
- (f) Meder v. Birt, Gilb. Eq. Rep. 185; Radford v. Wilson, 3 Atk. 815; and see Jerrard v. Saunders, 2 Ves. jun. 187; 4 Bro. C. C. 322; 6 Dow. 230.
  - (g) Ovey v. Leighton, 2 Sim. & Stu. 234.
- (h) Pennington v. Beechey, 2 Sim. & Stu. 282; Thring v. Edgar, 2 Sim. & Stu. 274.
  - (i) Anon. 2 Cha. Ca. 161; Price v. Price, 1 Vern. 185.
- (k) Harris v. Ingledew, 3 P. Wms. 91; Meads v. Duchess of Kingston, Mitf. on Plead. 2d edit. 216, n.

<sup>(468)</sup> See Snelgrove v. Snelgrove, 4 Des. 287.

<sup>(469)</sup> See 4 Des. 288.

<sup>(470)</sup> See 4 Des. 288.

<sup>(471)</sup> See 4. Des. 288.

Although a purchaser omit to deny notice by answer, he will be allowed to put in the point of notice by way of answer(l), and the omission will not invalidate his (\*)plea, if it is denied by that(m). If notice is omitted to be denied by the plea, and the plaintiff reply to it, the defendant has then only to prove his purchase, and it is not material if the plaintiff do prove notice, as he has waved setting down the plea for argument, in which case it would have been overruled(n). If, however, a bill is exhibited against a purchaser, and he plead his purchase, and the bill is thereupon dismissed, a new bill will lie charging notice, if the point of notice was not charged in the former bill, or examined to; and the former proceedings cannot be pleaded in bar(o). But if notice is neither alleged by the bill nor proved, and the defendant by his answer deny notice, an inquiry will not be granted for the purpose of affecting him with notice (p).

A plea of a purchase for valuable consideration without notice, will not be allowed where the purchaser might by due diligence have ascertained the real state of the title (q).

If a purchaser's plea of valuable consideration without notice be falsified by a verdict at law, and thereupon a decree is made against the purchaser, and he then carries an appeal to the House of Lords, it will be dismissed, and the decree affirmed without further inquiry(r)(472).

- (1) Anon. 2 Ch. Ca. 161.
- (m) Coke v. Wilcocks, Mose. 73.
- (n) Harris v. Ingledew, 3 P. Wms. 91; Eyre v. Dolphin, 2 Ball & Beat. 302.
  - (o) Williams v. Williams, 1 Cha. Ca. 252.
  - (p) Hardy v. Reeves, 5 Ves. jun. 426.
- (q) Jackson v. Rowe, 2 Sim. & Stu. 472. See and consider the case. It has been heard upon appeal before the Lord Chancellor.
  - (r) Lewes v. Fielding, Colles's P. C. 361.

<sup>(472)</sup> See Snelgrove v. Snelgrove, 4 Des. 288. (\*308)

The title of a purchaser for valuable consideration without notice is a shield to defend the possession of the (\*)purchaser(s), not a sword to attack the possession of others(t)(473). It is clear that it will protect his possession from an equitable title, although even that has been sometimes questioned(u); whether it will avail against a legal title is perhaps doubtful(474).

In Burlase v. Cooke(x), Lord Nottingham held the plea to be good against a legal estate; but in the subsequent case of Rogers v. Seale(y), he is reported to have been of a different opinion, and to have decreed accordingly. But unfortunately both these cases appear to be very ill reported(475).

In Parker v. Blythmore(z), the Master of the Rolls thought the plea good against a legal estate(476).

But in Williams v. Lambe(a), upon a bill filed by a dowress against a bona fide purchaser, without notice of the marriage, Lord Thurlow overruled the plea. He said that the only question was, whether a plea of purchase without notice would lie against a bill to set out dower; that he thought where the party is pursuing a legal title, as dower is, the plea did not apply, it being only a bar to an equitable, not to a legal claim(477).

In a later case(b), Lord Rosslyn considered it impos-

- (s) Patterson v. Slaughter, Ambl. 292.
- (t) See 3 Ves. jun. 225.
- (u) See 1 Ball & Beatty, 171.
- (x) 2 Freem. 24.
- (y) 2 Freem. 84.
- (z) 2 Eq. Ca. Abr. 79, pl. 1.
- (a) 3 Bro. C. C. 264.
- (b) Jerrard v. Saunders, 2 Ves. jun. 454.

<sup>(473)</sup> See 4 Des. 288.

<sup>(474)</sup> See 4 Des. 288.

<sup>(475)</sup> See 4 Des. 288.

<sup>(476)</sup> See 4 Des. 288.

<sup>(477)</sup> See Snelgrove v. Snelgrove, 4 Des. 288.

sible that Rogers v. Seale could be the decision of Lord Nottingham, and decreed that the plea could stand against a legal as well as an equitable title.

Lord Rosslyn did not, however, mention the case of Williams v. Lambe, which is against the doctrine he laid down; nor, indeed, did he notice the case of Parker v. Blythmore, which is in favor of it. It is much to be lamented that all the authorities were not considered.

(\*) To argue from principle, it seems clear that the plea is a protection against a legal as well as an equitable claim; and as the authorities in favor of that doctrine certainly preponderate, we may, perhaps, venture to assert that it will protect against both. But in a very late case, the Master of the Rolls followed the case of Williams v. Lambe, and was of opinion that the defence was of no avail against a legal title (c)(478).

# (c) Collins v. Archer, 1 Russ. & Myl. 284.

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<sup>(478)</sup> In Snelgrove v. Snelgrove, 4 Des. 289, wherein most of the learning contained in this chapter is examined, DESAUSSURE, Chancellor, in allusion to the text, says, "I am not entirely satisfied, that this is a correct conclusion. The inclination of my mind is the other way. It should be remembered, that the plea protects, by the court refusing to aid the complainant in setting up a title. Now, when the title attempted to be set up, is an equitable one, it seems very reasonable that the court should forbear to give its assistance in setting up such equitable title against another title set up by a fair purchaser. But when the complainant comes with a legal title, I do not perceive how he can be refused the aid of the court."

# APPENDIX.

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#### No. I.

Notice by the owner and his Agent, of the Agent's intention to bid(a).

SIR,

I, THE undersigned  $\mathcal{A}$ , of owner of the estates intended to be sold by you at by public auction, on the day of next, do hereby give you notice, that I have appointed the undersigned B, of, &c. to bid on my behalf, or for my use, at the same sale. And I, the above-named B, do hereby give you notice, that I have accordingly agreed to bid at such sale, for the use of the said A.

To Mr.

Auctioneer.

#### No. II.

Notice by the Agent of his intention to bid(b).

SIR,

I, the undersigned  $\mathcal{A}$ . of, &c. agent of  $\mathcal{B}$ . of, &c. owner of the estates intended to be sold by you at by public auction, on the day of next, do hereby give you notice, that I intend to bid at the same sale, on the behalf, or for the use of the above-named  $\mathcal{B}$ .

To Mr.

Auctioneer.

- (a) Vide supra, vol. i. p. 18.
- (b) Vide supra, vol. i. p. 19.

#### No. III.

Notice by the Agent, and the Person appointed by him, of such Person's intention to bid(c).

SIR,

I, the undersigned A., of, &c. agent of B, of, &c. owner of the estates intended to be sold by you at by public auction, (\*)on the day of next, do hereby give you notice, that I have appointed the undersigned C. of, &c. to bid at the same sale, on the behalf, or for the use of the above-named B. And I, the said C, do hereby give you notice, that I have accordingly agreed to bid at such sale, for the use of the said B.

To Mr. Auctioneer.

#### No. IV.

# Conditions of Sale(d).

I. That the highest bidder shall be the buyer: and if any dispute arise as to the last or best bidder, the lot in dispute shall be put up at a former bidding.

II. That no person shall advance less at any bidding than ...  $l_{i}(I)$ ; or retract his or her bidding (e).

III. That every purchaser shall immediately pay down a deposit, in the proportion of . . . . l. for every 100l. of his or her purchase-money, into the hands of the auctioneer (II); and sign an agreement for payment of the remainder to the proprietor, on the day of next, at at which time and place the purchases are to be completed, and the respective purchasers are then to have the actual possession of their respective lots; all outgoings to that time being cleared by the vendor.

IV. That within from the day of the sale, the vendor shall, at his own expense, prepare and deliver an abstract of his title to each

<sup>(</sup>c) Vide supra, vol. i. p. 19.

<sup>(</sup>d) Vide supra, vol. i. p. 30.

<sup>(</sup>e) Payne v. Cave, 6 Term Rep. 148. Vide supra, vol. i. p. 43. This has now become an usual condition.

<sup>(</sup>I) Or thus, "than such sum shall be named by the auctioneer at the time."

<sup>(</sup>II) This is scarcely ever done in the country; but the deposits are paid to the agent of the vendor.

<sup>(\*312)</sup> 

purchaser, or his or her solicitor; and shall deduce a good title (I) to the lots sold.

V. That upon payment of the remainder of the purchase-money at the time above mentioned, the vendor shall convey the lots to the respective purchasers: each purchaser, at his or her own expense, to prepare the conveyance to him or her; and to (\*)tender or leave the same at for execution by the vendor (f).

VI. That the auction-duty of 7d. in the pound shall, immediately after the sale, be paid to the auctioneer by the vendor and purchaser, in

equal moieties (g)(II).

VII. That if any of the purchasers shall neglect or fail to comply with the above conditions, his or her deposit-money shall be actually forfeited to the vendor, who shall be at full liberty to re-sell the lot or lots bought by him or her, either by public auction or private contract; and the deficiency (if any) occasioned by such second sale, together with all expenses attending the same, shall immediately after the same sale, be made good to the vendor by the defaulter at this present sale: and in case of the nonpayment of the same, the whole thereof shall be recoverable by the vendor, as and for liquidated damages (h), and it shall not be necessary to previously tender a conveyance to the purchaser.

Lastly, That if any mistake be made in the description of the premises, or any other error whatever shall appear in the particulars of the estate, such mistake or error shall not annul the sale, but a compensation or equivalent shall be given or taken, as the case may require(i). Such compensation or equivalent to be settled by two referees, or their umpire; each party within ten days after the discovery of the error, and notice thereof given to the other party, to appoint one referee by writing; and in case either party shall neglect or refuse to nominate a referee within the time appointed, the referee of the other party alone may make a final decision. If two referees are appointed, they are to nominate an umpire before they enter upon business, and the decision of such referees or umpire (as the case may be) shall be final.

Condition to be inserted where the Title-deeds cannot be delivered up(k).

That as the title-deeds which concern this estate relate to other estates

- (f) Vide supra, vol. i. p. 39. (h) Vide supra, vol. i. p. 40.
- (g) Vide supra, vol. i. p. 44. (i) Vide supra, vol. i. p. 41.
- (k) Vide supra, vol. i. p. 38.

<sup>(</sup>I) Where the estate is leasehold, and the vendor cannot produce the lessor's title, this condition should go on thus: "to the lease granted of the premises; but the purchaser shall not be entitled to require, or call for the title of the lessor." Vide supra, vol. i. p. 38.

<sup>(</sup>II) This condition should be omitted where the estate is sold by assignees of a bankrupt. Vide supra, vol. i. p. 13, 14.

of greater value, the vendor shall retain the same in his custody, and enter into the usual covenants (to be prepared (\*)by his solicitor, and at his expense) for the production of them to the respective purchasers: but all attested copies which may be required of such deeds shall be had and made at the expense of the person requiring the same.

Where an Estate is intended to be sold in Lots, and the Title-deeds are to be delivered up, the following Condition may be inserted:

That as the aforesaid lots are holden under the same title, the purchaser of the greater part in value of the said estate shall have the custody of the title-deeds, upon his entering into the usual covenants for the production thereof to the purchaser or purchasers of the remaining or other lots: If the largest portion in value of the estate shall remain unsold, the seller shall be entitled to retain the deeds upon entering into such covenants as aforesaid; all such covenants to be prepared by and at the expense of the person or persons requiring the same; who may have attested copies of such deeds at his, her or their own expense.

#### Or this:

That the title-deeds shall be retained by the vendor, until all the estates now offered for sale shall be sold, when they shall be delivered over to the largest purchaser, upon his entering into the usual covenants for the production thereof to the other purchasers; such covenants to be prepared by and at the expense of the person or persons requiring the same. Whilst the deeds remain in the seller's hands, he shall produce them to the several purchasers when required, and every purchaser may at any time have attested copies of the deeds at his own expense.

Where the Property is considerable, it may be advisable to make a stipulation as to the expense of the attested copies, according to the value of the lots. As, for instance:

That all attested copies of the title-deeds shall be made and delivered at the expense of the person requiring the same, unless his or her purchase-money exceeds . . . l. but does not amount to . . . l.; in which case the vendor shall furnish the attested copies of all such deeds and writings as shall be deemed necessary, according to professional usage, at the joint expense of him and the purchaser; and if the purchase-money exceeds . . . . l. the vendor shall furnish the same at his own expense.

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## (\*) No. V.

Agreements to be signed by the Vendor and Purchaser after Sales by Auction(1).

It seems advisable to have two sets of Conditions, at the end of one of which may be printed an Agreement for the Auctioneer, or Agent of the Vendor, to sign; and at the end of the other may be printed an Agreement for the Purchaser to sign.

The Agreement to be signed by the Auctioneer, or Agent of the Vendor, may be thus.

I do hereby acknowledge, that has been this day declared the purchaser of lot of the estates mentioned in the above-written particulars, at the sum of . . . l.; and that he has paid into my hands . . . l. as a deposit, and in part payment of the said purchase-money; and I do hereby agree, that the vendor shall, in all respects, fulfil on his part the above-written conditions of sale. As witness my hand, this

day of

Purchase-money - - - £.

Deposit-money - - - -

Remainder unpaid - . £.

Witness,

The Purchaser may sign the following Agreement:

I do hereby acknowledge, that I have this day purchased by public auction, lot of the estates mentioned in the above-written particulars, for the sum of . . . . l.; and have paid into the hands of the sum of . . . . l. as a deposit and in part payment of the said purchase-money; and I do hereby agree to pay the remaining sum of . . . l. unto at on or before the day of and in all other respects, on my part, to fulfil the above-written conditions of sale. As witness my hand, this day of

Purchase-money - - £.

Deposit-money - - -

Remainder unpaid - - £

Witness.

## (\*) No. VI.

Agreement for Sale of an Estate by Private Contract(m).

Articles of agreement made and entered into this day of between A., of, &c. for himself, his heirs, executors and administrators, of the one part, and B., of, &c. for himself, his heirs, executors and administrators, of the other part, as follow: viz.

The said A doth hereby agree with the said B to sell to him the messuages, &c. (parcels) with their appurtenances, at or for the price or sum of . . . . l; and that he the said A will within one month from the date hereof, at his own expense, make and deliver unto the said B or his solicitor, an abstract of the title of him the said A to the said messuages and premises; and will also, at his own expense, deduce a clear title thereto. And also that the said A, or his heirs, and all other necessary parties, shall and will, on or before the day of next, on receiving of and from the said B, his executors or administrators, the said sum of . . . l at the costs and charges of him the said B, his heirs, executors, administrators or assigns, execute a proper conveyance, for conveying and assuring the fee-simple and inheritance of and in all the said messuages and premises, with their appurtenances, unto the said B, his heirs or assigns, free from all incumbrances.

And the said B, hereby agrees with the said A, that he the said B, his heirs, executors, administrators or assigns, shall and will, on the execution of such conveyance as aforesaid, pay the sum of . . . l. unto the said A, his executors or administrators.

And it is hereby further agreed by and between the said A, and B, as follows: viz.

That the conveyance shall be prepared by and at the expense of the said B, and that the same shall be settled and approved of on the parts of the said A, and B, by their respective counsel; and that each of them, the said A, and B, shall pay the fees of his own counsel.

And that all rates, taxes and outgoings, payable for or in respect of the premises to the day of shall be paid and discharged by the said A, his executors or administrators.

And lastly, that if the said A shall not deliver an abstract of his title to the said B, or his solicitor, before the expiration of (\*)one calendar month from the date hereof, or shall not deduce a good and marketable title to the said messuages and premises, before the said

day of then and in either of the said cases, immediately after the expiration of the said one calendar month, or the said day of (as the case may be), this present agreement shall be utterly void to all intents and purposes whatsoever, and the jurisdiction of equity wholly barred; it being the true intent and meaning of the parties hereto, that in the event aforesaid execution of this agreement shall not be enforced by any court of equity, notwithstanding any rule (if such there be) that time cannot be made the essence of a contract, or any other rule or maxim whatsoever(n). In witness, &c.

A provision may also be inserted in agreements, making time the essence of the contract, in case the purchase-money is not paid at the day appointed; but clauses making agreements void if a title is not made, or the purchase-money paid by a stated time, should never be inserted unless it be the express intention of the parties. Where time is not deemed material, clauses to the following effect should be inserted:

That the said B. and his heirs shall have, receive and take the rents and profits of the said messuages and premises, from the day of next, for his and their proper use.

And that if the said conveyance shall not be executed by the necessary parties, and the said purchase-money paid on or before the said day of then and in such case the said B., his heirs, executors or administrators, shall from the same day of pay interest for the said purchase-money unto the said A., his executors or administrators, after the rate of per cent. per ann.

#### No. VII.

Bratt v. Ellis(o), C. B. Mich. and Hil. Terms, 45 Geo. III.

John Goodwin being indebted to Ellis, the defendant, an auctioneer, deposited the title-deeds of some houses with him, as a security; and gave him a written authority to sell them by auction, at any time before Midsummer 1803. They were (\*)accordingly put up at Garraway's; and not fetching the sum expected, they were bought in by Goodwin. Ellis not being paid, put up the houses again in September 1804, under the usual conditions. The plaintiff was declared the highest bidder at 3151.; paid a deposit of 751. and signed an agreement to complete the contract. The defendant delivered possession to the plaintiff, who expended about 101. in repairs; and the defendant sent the deeds to the

plaintiff's attorney, who approved of the title, and prepared a conveyance; and the defendant undertook to procure Goodwin to attend and execute the deed. Goodwin, however, upon being applied to, refused to complete the contract, which was made without his authority. The plaintiff brought the present action to recover the deposit-money and interest, and the expense of perusing the abstract, preparing the conveyance, &c.; and the damages the plaintiff had sustained by losing such a good bargain. The plaintiff gave 315l. for the houses, and a surveyor, examined on his behalf, proved that they were worth 751l. The defendant suffered judgment to go by default. Upon the execution of the writ of inquiry of damages, the defendant's counsel admitted, that he was liable to repay the deposit, with interest, and fair expenses incurred in investigating the title, &c. But as it appeared by the declaration that the defendant was only an auctioneer, and Goodwin was the owner, he insisted that the defendant was not answerable for the difference of value. The sheriff, in his charge to the jury (which was specially summoned), said, it was admitted on all hands, that the deposit and interest, and expenses, must be paid to the plaintiff. With respect to the demand for the loss of the bargain, he thought that the demand was recoverable; for the defendant had admitted that he had sold the property without authority; but the amount of the damages was in their discretion. They would consider whether it would have sold for 7511. If they believe the surveyor, it would be quite competent to give the whole, or what they pleased. The jury returned a verdict for 350l. being upwards of 250l. as damages for loss of the bargain. The Court of Common Pleas, however, granted a rule to show cause why the writ of inquiry should not be set aside, and the defendant let in to plead in the action, upon paving into Court the deposit-money, and interest, and on payment by the defendant to the plaintiff of his costs occasioned thereby, together with his costs of the present application. Upon showing cause, the Court made the rule absolute; on(\*) payment to the plaintiff of the deposit, with interest, the costs of investigating the title, and the costs of the action, as between attorney and client,

#### No. VIII.

Jones v. Dyke and others(p). Kereford Summer Assizes, cer. Macdonald, C. B.

The circumstances of the case were shortly these. Some estates in

( p) Vide supra, vol. i. p. 45.

Wales having been advertised for sale, the plaintiff came to town, and after some treaty with the defendants, who were the auctioneers employed, he agreed to purchase the estate in question, at 975l.; and it was agreed that he was to pay the deposit in nine days, and to give his note for it at that date, which he accordingly did. Tuchin, one of the defendants, by the desire of his partner Dyke, gave the plaintiff a receipt for the deposit, and signed a printed particular, which together amounted to an agreement in writing.

In a few hours after this transaction, Dyke and Tuchin called on a friend of the plaintiff's to acquaint him that they had just received a letter from Wales, stating that the estates were sold for more money, and requesting the particular and receipt to be returned; and the plaintiff refusing to relinquish the agreement, and having immediately returned to Wales, they by the next post sent to him his note of hand, and a particular signed by him, both of which he instantly returned.

The 1001. was tendered in payment of the note, and refused: the residue of the purchase-money was prepared in time, and deposited at a banker's.

The plaintiff filed a bill in equity against the owner of the estate, and his trustees for sale, who denied the authority of the defendants to sell, in consequence of which the plaintiff was advised to dismiss his bill.

The plaintiff then brought an action against the defendants, in which he proved by two witnesses that the estate purchased was worth 2,117l. 10s. so that he lost upwards of 1,140l. by breach of the agreement.

It appearing that the defendants had no authority to sell, the plaintiff had a verdict by consent, for 261l. the Judge thinking (\*)the items of which that sum was composed reasonable, but the plaintiff did not obtain any damages for the loss of his bargain.

The sum of 261l. was thus made up:				
Costs of the plaintiff's solicitor		47	19	4
Costs of the trustees in equity, about	- '-	30	-	-
Interest of 975l. from April 1804 to April 1807 -		146	5	-
Journies to London and Llandilo, about 20 days,		21		
horse-hire and travelling expenses )				
Journey to London	as - 1 40	15	15	-
	£	. 260	19	4

#### No. IX.

Wyatt v. Allen(q), Reg. Lig. B. 1777, fol. 576.

The bill was filed by Wyatt, charging that he, as agent for the defendant Allan, purchased an estate by auction, but that the defendant having denied the commission, he himself was forced to complete the purchase. The purchase-money was 435l. The defendant by his answer denied that he employed the plaintiff to purchase the estate.

The Chancellor directed an issue to try the fact, and that if the jury found that an authority was given by Allan, they should indorse on the postea to what amount such authority extended. The jury found that Allan did give an authority to the extent of 400l. Upon the cause coming back on the equity reserved, the defendant was ordered to pay the plaintiff the 400l. and the plaintiff was to assign the estate, and the defendant was to pay the costs both at law and in equity.

#### No. X.

Sir John Morshead and others v. Frederick(r) and others. Ch. 20th February 1806.

Certain estates of the late Sir John Frederick were devised to trustees upon trust, by mortgage or sale thereof, to raise 34,000l. for the benefit of his two daughters, Lady Morshead and Miss Thistlethwayte. Part of his estate consisted of a house in the (\*) occupation of Smith, Payne and Smith, the bankers. In 1751, a ground lease of this house was granted for sixty-one years, at 56l. a year. The representative of the lessec assigned the lease to Smith and Company, subject not only to the original ground rent of 56l. a year, but also to an additional rent of 210l. A bill was filed for carrying the trusts of Sir John Frederick's will into execution. With the approbation of all parties, the house in question was offered for sale, and represented as subject to the ground lease at 56l. a year. Smith and Company employed an auctioneer to enter into a treaty with the plaintiffs' solicitors for the purchase of the house, and he was informed by them that it was subject to the lease at 56l. a year. The auctioneer valued the house as being subject to the lease, and to no other rent, charge,

<sup>(</sup>q) Vide supra, vol. i. p. 46 (\*321)

or incumbrance, at 6,150l. and verbally agreed with the plaintiffs' solicitors for the purchase by Smith and Company of the house at that sum: the contract was referred to the Master, who approved of it, and by an order in the cause, Smith and Company were directed to pay the purchase-money into Court, to the credit of the cause, and it was ordered that they should be let into receipt of the rents from the last quarter day. The title was approved of on behalf of the purchasers, and the money was paid into the Bank according to the order. A few months afterwards, and before the conveyance was executed, application was made to Smith and Company for payment of the rent of 210l. to the person entitled to it. Upon this, Smith and Company insisted upon an abatement in the purchase-money, which the plaintiffs would not accede to. A motion was then made to the Court by Smith and Company, that the money paid into the Bank might be repaid to them, and the contract for the purchase of the house rescinded. In support of this motion, the auctioneer swore, that he valued the house as subject to the 56l. a year only, and that he was ignorant of its being subject to any other rent or outgoing. The solicitor for Smith and Company swore, that no notice was taken in the abstract of the lease, by which the 210l. a year was reserved. One of the bankers swore, that when the money was paid into the Bank, and when the valuation was made, he and his partners believed that the auctioneer had been made fully acquainted with all the charges, whether consisting of rents or otherwise, which in anywise affected the house; and that his not being made acquainted with the rent of 210l. was occasioned by some undesigned omission or mistake.

(\*)In opposition to these affidavits, the solicitor of the plaintiffs swore, that he had been in receipt of the rent of 56l. a year nearly thirty years, which had been paid by Smith and Company since 1797, and that he had never heard that the house was ever granted by any under lease, or was made subject to any other rent than the rent of 56l. until long after the sale to the bankers. And that upon inquiry he found, that the rent of 210l. had been paid by the bankers themselves ever since they purchased the lease.

The motion came on before Lord Eldon, who expressed an opinion in favor of the purchaser's right to rescind the contract, but did not decide the point. It afterwards came before Lord Erskine, who held this to be a proper case for the interference of equity, on the ground of mistake, and accordingly granted the motion. The circumstance of both rents being payable by the purchasers, his Lordship thought immaterial, as it appeared that they had not communicated that circumstance to their broker, and the magnitude of their concerns might easily account for the omission. It could not be imagined, that any man

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would willingly conceal such a fact from a broker employed by him to value any property he wished to purchase; and it was equally absurd to suppose, that if a broker, in valuing any property, was ignorant of the existence of an additional rent of 2001. no relief lay against such a mistake in a court of equity.

#### No. XI.

A Bill for extending the Provisions of the Statute of Frands(s).

Whereas by an act passed in the twenty-ninth year of his Majesty Charles the Second, entitled "An Act for the Prevention of Frauds and Perjuries," it is enacted, that no action shall be brought whereby to charge any person upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person by him lawfully authorized: And whereas a similar (\*) enactment is contained in an act passed in Ireland, in the seventh year of the reign of King William the Third: And whereas it has been held that an agreement signed by one party, or his agent, is binding upon him, and that it is not necessary for a party or his agent to subscribe his name to the agreement for the purpose of authenticating it, where the name is introduced in the agreement itself; and in some cases concluded contracts have been allowed to be collected and made out from receipts for purchase-money, letters, correspondence or proposals, or the like, not assuming the ordinary shape of an agreement or a memorandum, or a note thereof: And whereas courts of equity have, on the ground of part performance, held certain cases of parol agreements not to fall within the mischief of the enactments aforesaid: And whereas it is expedient to alter and amend the law as it is at present administered under the said statutes in the respects aforesaid; Be it therefore enacted, that no action or suit shall be brought or maintained whereby to charge any person upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them, unless the agreement upon which the same is brought, or some memorandum or note thereof, shall be in writing, and signed by the parties to be charged therewith, or some other persons by them lawfully authorized at the foot thereof, in the usual manner of subscribing regular agreements.

And be it further enacted, that letters or correspondence passing

<sup>(</sup>s) Vide supra. vol. 1, p. 86.

between the parties or their authorized agents, or an offer in writing by the one party, and acceptance in writing by the other, shall not be deemed in any case to amount to an agreement upon which an action or suit may be brought or maintained under the provisions of the said recited acts or of this act.

And be it further enacted, that neither delivery of possession of the estate which is the subject of the contract, nor payment of the purchase-money or rent agreed to be paid for the estate, or expenditure of money by any of the parties on the estate, or any other act whatsoever, shall be deemed to amount to a part performance of any agreement made upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them, so as to enable a court of equity to decree a specific porformance of any such agreement, where the same is not signed in the same manner required by this act.

Provided always, and be it enacted, that where any agreement shall be bona fide made upon any contract or sale of lands, (\* tenements or hereditaments, or any interest in or concerning the same, and the same shall not be signed in the manner by this act required, to enable an action or suit to be brought or maintained thereupon, but where it is upon a sale, the seller, upon the faith and footing of such contract, shall have let the purchaser into possession of the property sold, or the purchaser, upon the faith and footing of such contract, shall have paid to the seller the purchase-money, or any part thereof, or having been let into possession of the property, shall, with the acquiescence of the seller, have made any substantial repairs or lasting improvements upon such property, and where in any such case either of the parties to such contract shall refuse to perform the same on his part, the other of the said parties shall or may maintain an action against the party so refusing for the recovery of the damage sustained by him by the payment of any such pur-chase-money, or by the expenditure in such repairs or improvements, or by the loss of the rents and profits or possession of the property sold, as the case may be; and in every such action brought by a seller, the defendant, the purchaser shall be at liberty to set-off against the plaintiff's demand the amount of any purchase-money paid to the plaintiff by the defendant, with interest thereon, at the rate of four pounds per centum per annum, and the amount, of any monies actually expended by the defendant in substantial repairs or lasting improvements on the estate of the plaintiff, with his acquiescence; and in every such action brought by a purchaser, the defendant, the seller shall be at liberty to set off against the plaintiff's demand the amount of any rents and profits of the property sold which shall have been received by the purchaser, or an occupation-rent for the property sold, where it shall have been in the plaintiff's own possession, as shall be just; and where

any such agreement as last aforesaid is upon a letting, and the intended tenant having been let into possession by the intended landlord (the other contracting party), shall, upon the faith and footing of such contract, with the acquiescence of the landlord, have made any substantial repairs or lasting improvements on such property, and the landlord shall afterwards refuse to perform the agreement, in any such case the tenant may maintain an action against the party so refusing for recovery of the damages sustained by the expenditure in such repairs or improvements: and in such action, the defendant shall be allowed such set-off as shall be just; and the amount of the damages recovered in any such action by (\*)a purchaser or tenant shall be and be deemed an equitable lien on the estate contracted to be sold or let, as and from the day on which such contract was entered into, and shall carry interest from the time the verdict is given; and in every such case as aforesaid, where a lien is to be established on the estate contracted to be sold or let, or where an account is to be taken between the parties, either party may file a bill in equity against the other for the purpose of enforcing the rights hereby given.

And whereas by the said Act of the twenty-ninth year of his late Majesty King Charles the Second, it is enacted, that no leases, estates or interests, either of freehold, of terms of years, or any uncertain interest, not being copyhold or customary interest, of, in, to or out of any messuages, manors, lands, tenements or hereditaments, shall at any time after the four-and-twentieth day of June therein mentioned, be assigned, granted or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting or surrendering the same, or their agents thereunto lawfully authorized by writing or by act and operation of law: And whereas it is expedient that assignments and surrenders of leases, estates or interests, of, in, to or out of any messuages, manors, lands, tenements or hereditaments which do not exceed the term of three years from the making thereof, may hereafter be made without any deed or note in writing; Be it therefore enacted, that from all leases of, in, to or out of any manors, and after the messuages, lands, tenements or hereditaments, not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord during such term amounted at the time of the creation thereof to three-fourth parts at the least of the full improved value of the subject demised, may be assigned or surrendered without any deed or note in writing.

And whereas by the said recited acts it is further enacted, that all devises of lands, devisable either by the statute of wills or by custom, shall be in writing signed by the party devising, or by some other in his presence and by his express directions, and shall be attested and sub-

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scribed in the presence of the devisor by three or four credible witnesses, or else they shall be void: And whereas it is expedient to alter and amend the law as it is administered under the said statutes, in the respect last aforesaid; Be it therefore further enacted, that where any such devise as aforesaid in writing, shall, without fraud, be attested and subscribed by three or four credible witnesses, as part of the transaction which they are called upon to witness, and before (\*) they depart from the house or place wherein or whereat the will was signed by the testator, the same shall be deemed an effectual attestation within the said statutes, although not subscribed in the actual presence of the devisor, or where he might see the witnesses subscribe the same.

And be it further enacted, that this act shall operate on all such agreements and deposits as aforesaid only as shall be made after the passing of this act, and upon all such devises as aforesaid only where the devisors making the same shall die after the passing of this act.

### No. XII.

## Ex parte Tomkins(t), L. I. Hall, 23d August 1816.

A mortgagee obtained an order for sale of the estates under a bankruptcy. The assignees, without leave of the Court, appointed several puffers to bid, and two lots were knocked down to them. Lord Eldon determined that they must be held to their bargain, although they swore that they believed there was no real bidder. And in answer to an application, that if there should prove to be a real bidder, the assignees might only be compelled to pay the price which he bid, the Lord Chancellor, said, that although it was a hard case, they must pay the sum at which the lots were knocked down. The order was for a sale, and they were not authorized to buy the estate in; their biddings might have prevented the estate from selling to a bonû fide bidder, and it was impossible for the Court to say that the estate would not have fetched more than the last real bidding, if the puffer appointed by the assignees had not afterwards bid. A majority of the creditors in such a case could not bind the rest, and if assignees choose to act, they ought to procure an indemnity from the creditors.

#### No. XIII.

### Observations on the Annuity Act(u).

To this passage a note was added in a former edition, in which it was contended that the 17 Geo. III. c. 26, commonly called (\*)the Annuity Act, extended to money considerations only, notwithstanding the case of Crosly v. Arkwright, 2 Term Rep. 603. The authorities relied on, were Crespigny v. Wittenoom, 4 Term Rep. 790; Hutton v. Lewis, 5 Term Rep. 639; Ex parte Fallon, 5 Term Rep. 283; and Horn v. Horn, 7 East, 529; to which might be added Doe v. Philips, 1 Taunt. 356. But the point is not now of much importance. The decisions under the Annuity Act had gone far beyond the letter, and in many cases even beyond the spirit of the law: and perhaps there was not any act in the statute-book on which so many cases had been decided within any thing like the same space of time. The expense of the memorial was very considerable, and the effect of the decisions, by increasing the risk of the transaction, drove fair purchasers out of the market, and lowered the price of life annuities; first, because the number of buyers was small; and secondly, because the purchasers required to be paid not only the common rate of annuity interest, but also the value of the risk of the transaction being void under the act. The Annuity Act, after having been thirty-five years in operation, was repealed by the 53 Geo. III. c. 141, except as to annuities granted before the passing of the repealing statute; and other provisions were substituted in lieu

The first section repeals the old act.

The second section requires, that within thirty (in the old act it was twenty) days after the execution of every deed, bond, instrument, or other assurance, whereby any annuity or rent-charge shall, from and after the passing of the act, be granted for one or more life or lives, or for any term of years, or greater estate determinable on one or more life or lives, a memorial of the date of every such deed, bond, instrument or other assurance, of the names of all the parties, and of all the witnesses thereto, and of the person or persons for whose life or lives such annuity or rent-charge shall be granted, and of the person or persons by whom the same is to be beneficially received, the pecuniary consideration or considerations for granting the same, and the annual sum or sums to be paid, shall be enrolled in the High Court of Chancery, in the form or to the effect following, with such alterations therein as the nature and circumstances of any particular case may reasonably require: otherwise every such deed, bond, instrument or other assurance, shall be null and void to all intents and purposes.

<sup>(</sup>u) Vide supra, vol. 1, p. 281.

# (\*)FORM OF ENROLMENT.

Amount of Annuity or Rent Charge.	Money, paid in 100f, a year, 500f, paid in Notes of the Governor and Company of her Bank of Anter Notes or hange, as the case may be.	
Consideration, and how paid.	Money. 500f. paid in Notes of the Governor and Company of the Bank of England, or other Notes or Bills of Exchange, as the case may be.	• •
Person or Persons for whose Life or Lives the An- nuity or Rent Charge is granted.	A. B	For secuting the same Annuity or Rent Charge.
Name or Names of Person or Persons by whom Annuity or Reut Charge to be beneficially received.	C. D.	For secuting the sam
Names of Witnesses.	E. F. of G. H. of	E. F
Names of Parties.	A. B. of one Part. C. D. of the other Part.	Bond in Penal- ty of 1,2001.  Warrant of A. B. to I. K. and L. Attorney to M. Attornies of Court confress Judge ment on the same Bond.
Nature of Instrument.	Indentures of Lease and Release.	Bond in Penal- ty of 1,2001.  Warrant of Attorney to confess Judg- ment on the same Bond.
Date of Instrument.	10 Aug. 1829.	Same Date.

(\*) The great object of this provision was to give publicity to the transaction, and at the same time to avoid unnecessary expense to the grantor; and by the simplicity of the memorial to avoid, if possible, future litigation. As the act passed the House of Commons, the memorial was required to contain only four things, viz. 1. the date of the grant; 2. the name of the grantor; 3. the name of the person by whom the annuity was to be beneficially received; and 4. the amount of the annuity. The statement of the consideration was omitted, lest it should open a door to the mischiefs which the act was intended to guard against. The schedule stands as it was amended in the House of Lords. The nature of the instrument is required to be stated, to which there can be no particular objection, although it is not mentioned in the body of the act. The next amendment substitutes the names of the parties for the name of the grantor. This seems open to objection, for in many cases it may not appear who is the grantor: for example, if Richard is possessed of a lease in trust for Edward, and Edward sells an annuity to Frederick, the deed would, in the ordinary course, be made between Richard of the first part, Edward of the second part, and Frederick of the third part, and thus the memorial would stand; from which it would be inferred that Richard and not Edward was the grantor. The provision in the act, as it passed the House of Commons, was not open to this objection. The third column requires the names of the parties simply to be stated, and does not seem to require their additions to be inserted, but in the next column where the names of the witnesses are required, a blank is left in the example, manifestly for the addition, "E. F. of ." In complying with both these requisitions, the additions of the persons should be inserted, and this is expressly required in the latter instance. This fourth column was an amendment in the Lords. In the late case of Darwin v. Lincoln, 5 Barn. & Ald. 444, it was held that a witness described in the memorial as the clerk of the attorney was not well described, because his place of abode was not stated. This led to the passing of another Act of Parliament, which will presently be noticed.

The memorial must contain the Christian name of the subscribing witness to the securities. The initial of the Christian name is not sufficient. Cheek v. Jeffries, 2 Barn. & Cress. 1, and this has been followed in a late decision upon an annuity granted by Lord Strathmore. It would be prudent to state (\*) which of the several executions the witnesses attested. It is sufficient to state, that the annuity was granted for the lives of A. B. &c. without stating more than their names, or adding that the annuity was granted for their joint lives, or the life of the survivor, or for a term of years determinable on those lives. Barber v. Gamson, 4 Barn. & Ald. 281. Another amendment requires (\*329) (\*330)

the statement of the consideration and how paid. The latter words it was at first thought might be understood, in what manner, which would lead to all the inconveniences intended to be remedied, but it now seems agreed, that the words are not open to that construction: the meaning is, that the amount of the consideration shall be stated, and whether paid in money, notes, bills, &c. This is clear from the explanation in the act; it need not therefore be stated by or to whom the money was paid, and there is now no exception to the rule that a payment by an agent is a payment by the principal. It is observable that the amendment requires the pecuniary consideration or considerations to be stated. Perhaps it escaped observation, that the act extends as well to annuities granted for money's worth, as for money; but as the act stands, it is clear that none but money considerations need be stated in the memorial. It has been decided in James v. James, 2 Brod. & Bing. 702, (and see Blake v. Attersoll, 2 Barn. & Cress. 875; Tetley v. Tetley, 4 Bing. 214.) that an annuity granted in consideration of a conveyance of a life interest in land does not require enrolment. The Court said that the words in the tenth section, declaring that the act shall not extend "to any voluntary annuity granted without regard to pecuniary consideration or money's worth," import that money's worth may, in certain cases, be "a pecuniary consideration" within the meaning of the act; as where the grantee pays for the annuity in part, or in whole, by goods or merchandize, with a nominal or perhaps real value imposed upon them, to be converted into money by the grantor, and where the object of the grantor was to raise money, and such appears to be the real nature of the transaction, however it may be disguised. But considering the second and tenth sections together, and the intent of the Legislature as it is to be collected therefrom, the Court was of opinion that the act does not extend to cases of fair and bonû fide sale of landed property, whether freehold for life or leasehold for term of years, where the consideration in part or in whole may be an annuity to be paid to the vendor. In such cases, the consideration for granting the annuity, being (\*)an estate in land bonû fide sold and conveyed, did not appear to the Court to be a pecuniary consideration or money's worth within the meaning of the statute.

A description in the memorial of an underlease of leaseholds as an assignment, is a sufficient compliance with the act, which is satisfied by a description of the instrument in popular language, although that be not according to its strictly legal effect. Butler v. Capel, 2 Barn. & Cress. 251.

The form of the memorial is the only part of the act in which any substantial amendment was made in the House of Lords.

It has been decided, that the memorial need not state that the annuity

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is redeemable That clause does not come within the schedule, and as Abbott, C. J. remarked, if any thing not specified in the schedule be necessary, the schedule itself would be worse than useless. The name of the party in whose favor a warrant of attorney is given need not be stated in the memorial; Yems v. Smith, 3 Barn. & Ald. 206; nor is it necessary to state for what penal sum it authorizes a confession of judgment. Barber v. Gamson, 4 Barn. & Ald. 281.

The third section provides, that if any such annuity shall be granted by, or to or for the benefit of any company exceeding in number ten persons, which company shall be formed for the purpose of granting or purchasing annuities, it shall be sufficient in any such memorial to describe such company by the usual firm or name of trade.

The fourth section enacts, that in every deed, bond, instrument or other assurance, whereby any annuity or rent charge shall, from and after passing of this act, be granted or attempted to be granted, for one or more life or lives, or for any term of years, or greater estate determinable on one or more life or lives, where the person or persons to whom such annuity shall be granted or secured to be paid, shall not be entitled thereto beneficially, the name or names of the person or persons who is or are intented to take the annuity beneficially, shall be described in such or the like manner as is hereinbefore required in the enrolment; otherwise every such deed, instrument or other assurance shall be null and void.

The object of this provision was to prevent one person from secretly buying an annuity in the name of another. It was thought right that the grantor should know with whom he was dealing: in all other respects an annuity deed is now placed on the same footing with other deeds. This is a great point (\*)gained. If the consideration is money, it must be correctly stated under the last stamp act; if it is stated as a money consideration, and any part is paid in goods, the annuity, as we shall presently see, may be set aside.

The fifth section enables the grantor to obtain a copy of the deeds by a Judge's summons.

The sixth section enacts, that if any part of the consideration for the purchase of any such annuity or rent-charge shall be returned to the person advancing the same, or in case such consideration, or any part of it, shall be paid in notes, if any of the notes, with the privity and consent of the person advancing the same, shall not be paid when due, or shall be cancelled or destroyed without being first paid; or if such consideration is expressed to be paid in money, but the same or any part of it shall be paid in goods; or if the consideration or any part of it shall be retained, on pretence of answering the future payments of the annuity or rent-charge, or any other pretence; in all and every the

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aforesaid cases it shall be lawful for the person by whom the annuity or rent-charge is made payable, or whose property is liable to be charged or affected thereby, to apply to the Court in which any action shall be brought for payment of the annuity or rent-charge, or judgment entered, by motion, to stay proceedings on the action or judgment, and if it shall appear to the Court that such practices as aforesaid, or any of them, have been used, it shall and may be lawful for the Court to order every deed, bond, instrument or other assurance, whereby the annuity or rent-charge is secured, to be cancelled, and the judgment, if any has been entered, to be vacated. See Barber v. Gamson, 4 Barn. & Ald. 281.

This is similar to a provision in the old act, with the addition of the words in italics, and the power is enlarged to cancel every security for the annuity.

The seventh section provides, that a book shall be kept for the enrolment of the memorials, 20s. to be paid for the entry of the memorial, 1s. for every certificate of entry and copy, and 1s. for every search.

The eighth section renders void contracts with infants, and the ninth punishes brokers taking beyond 10s. per cent for brokerage. These provisions are copied from the old act.

The tenth and last section enacts, that the act shall not extend to Scotland or Ireland, nor to any annuity or rent-charge given by will or by marriage settlement, or for the advancement (\*) of a child, nor to any annuity or rent-charge secured upon freeholds or copyhold or customary lands, in Great Britain or Ireland, or in any of His Majesty's posses sions beyond the seas, of equal or greater annual value than the said annuity, over and above any other annuity, and the interest of any principal sum charged or secured thercon, of which the grantee had notice at the time of the grant, whereof the grantor is seised in fee simple or fee tail in possession, or the fee simple whereof in possession, the grantor is enabled to charge at the time of the grant, or secured by the actual transfer of stock in any of the public funds, the dividends whereof are of equal or greater annual value than the said annuity; nor to any voluntary annuity or rent-charge granted without regard to pecuniary consideration or money's worth; nor to any annuity or rent-charge granted by any body corporate, or under any authority or trust created by act of parliament.

This is copied from the old act, with the additions in italics; the additions require no explanation, and, I believe, meet all the questions which arose on the provision in the repealed act. The provision in the old act, which excepted out of its provisions annuaties not exceeding 10l. was not inserted in the new one. The practice with professed money lenders was to split the consideration into several parts, and make

the man wanting the money grant 10l. annuities to different persons, to the amount agreed upon. By this plan they increased the expenses of the grantor to a considerable amount, and at the same time avoided giving publicity to the transaction.

In considering the operation of the new act, it will be necessary for the reader to keep in view the circumstance, that it extends to annuities, although not exceeding 10l., and also embraces annuities granted for money's worth. As to the latter, see James v. James, before cited.

In consequence of the decision before referred to in Darwin v. Lincoln, the act of the 3 Geo. IV. c. 92, was passed. By that act, after reciting the second section of the act of the 53d of Geo. 3, and that the form or effect to which such enactment refers is expressed in several columns, at the head of one of which are the words "Names of witnesses," and underneath, as applicable to indentures of lease and release, the letters and words, "E. F. of "G. H. of ," and as applicable to a bond and warrant of attorney to confess judgment, the letters "E. F." "G. H." without the word "of;" and reciting, that the words of enactment referring to such form express only that a (\*) memorial of the names of all the witnesses to every such deed, bond, instrument or other assurance as therein mentioned, should be enrolled as directed by the said Act, without providing that any description of the witnesses should be given in such memorial, except as such form is thereby referred to; and such form does not provide that any description should be added to such names except by the addition of the word, "of" to the letters "E. F." and "G. H." as aforesaid, as applicable to indentures of lease and release; and reciting, that in consequence of such indistinct enactment it might be doubtful whether it was the intention of the Legislature to require any, or if any, what description to be added to the names of witnesses in the memorial of any deed, instrument or assurance, to be enrolled as aforesaid; and reciting that a very great number of memorials of grants of annuities had since the passing of the said act been enrolled, in which the names of the witnesses to the deeds, instruments or assurances specified in such memorials, had been inserted without the addition of the place of abode of such witnesses, and it has been inferred from the use of the word "of" after such letters " E. F." and after such letters " G. H." as aforesaid, that it was necessary to describe each of such witnesses in such memorial as of some place, and in consequence thereof some grants of annuities made since the passing of the said act had been, in proceedings in summary applications to courts of justice which could not be reviewed in any superior court, deemed null and void, on the ground that no description of the place of abode of the witnesses to some or one of the deeds, instruments or assurances by which such grants of annuities had (\*334)

been made, had been inserted in the memorials or memorial thereof enrolled as directed by the said act; and also reciting, that doubts had been entertained whether the construction so put on the said act is the true construction thereof, more especially as the same is so far penal as renders deeds, instruments and assurances, of which memorials had not been enrolled in pursuance of the said act, null and void; and the provisions in the said act are not so clear and explicit as the same ought to have been under such circumstances, and the parties claiming under grants of annuities might have been thereby misled and induced to conceive that it was not necessary, under the provisions of the said act, to insert in the memorial of any deed, instrument or assurance, to be enrolled as aforesaid, the place or places of abode of the witness or witnesses to such deed, instrument or assurance, or any more than the name or names of such witness or witnesses, there (\*) being no words in the said act expressly requiring any more to be so inserted, nor any words from which it could be inferred that any more was required to be inserted, except the word "of" after the letters "E. F." and "G. H." respectively, with reference to one species of assurance, inserted in the form of memorial before mentioned, and that it was expedient to remove all doubts touching the construction of the said act with respect to so much of the memorials required by the said act to be enrolled as relates to any description of the witness or witnesses to any deed, instrument or assurance; it is enacted, that by the said act of the 53d year of the reign of his said Majesty Geo. 3, no further or other description of the subscribing witness or witnesses to any deed, bond, instrument or other assurance, whereby any annuity or rent-charge is or may be granted, is required in the memorial thereof, besides the names of all such witnesses; and so the said act shall be deemed, construed and taken. See St. John r. Champneys, 1 Bingham, 77. And by the same act(x), after reciting that doubts had also arisen whether under the said act of the 53d year of the reign of his said Majesty Geo. 3, the omission to enrol a memorial of any of the assurances for securing any annuity or rent-charge did not vitiate the whole transaction, notwithstanding the enrolment of a memorial of another deed, bond, instrument or other assurance granting the same(I); and that it was also expedient to remove such doubts, it was enacted and declared that every deed, bond, instrument or other assurance granting any annuity or rentcharge, and of which a memorial shall have been or shall be duly enrolled pursuant to the said act, notwithstanding the omission to enrol

(x) Sect. 2.

<sup>(</sup>I) This is singular; for the former act expressly authorizes every security to be cancelled.

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any other de..., work instrument or assurance for securing such annuity or rent-charge, shall be valid and effectual according to the intent, meaning and true effect thereof, notwithstanding a memorial of any other deed, bond, instrument or assurance for securing the same annuity, shall not have been duly enrolled pursuant to the said act.

And by the same act it is provided(y) and enacted, that nothing in the said act contained shall extend to give any other force or validity to any deed, bond, instrument or other assurance of which a memorial shall have been duly enrolled as aforesaid, than such deed, bond, instrument or other assurance would have had if any deed, bond, instrument or other assurance for securing (\*)the same annuity, of which a memorial shall not have been duly enrolled, had never been executed.

And by the said act it is also provided (z) and further enacted, that the said act shall not extend or be construed to extend to revive or give effect to any deed, bond, instrument or other assurance, whereby any annuity or rent-charge hath been already granted, so far as the same hath been adjudged, declared, treated or deemed void by any judgment, decree, action, suit or proceeding at law or in equity, or by any act or deeds of the parties thereto, or by any other legal or equitable means whatsoever; nor shall the said act affect or prejudice any suit or proceeding at law or in equity commenced on or before the 31st day of May 1822, and now depending, upon the ground of an alleged defect in the memorial thereof in not describing the witnesses thereto otherwise than by his, her or their name or names, for avoiding any such deed, bond, instrument or other assurance.

The current of judgment is now altered, and a fair and liberal construction is put upon the acts in favor of bonâ fide transactions. See Faircloth v. Gurney, 9 Bing. 622.

### No. XIV.

# Coussmaker v. Sewell(a), Ch. 4th May, 1791.

In this cause it was referred to Master Greaves to see if a good title could be made to the estate in question. An abstract was delivered. It appeared by it, that William Perkins, an ancestor of the vendor, had made a settlement of his estate in the year 1705; but neither the settlement itself, nor any copy or abstract of it, could be produced, and the contents of it were totally unknown. In 1751 a fine was levied by Mr. Perkins and his eldest son; and in 1763 a recovery was suffered, in which Mr. Perkins and his second son (the eldest son being then

<sup>(</sup>y) Sect. 3. (z) Sect. 4. (a) Vide supra, vol. 1, p. 356. (\*336)

dead) joined in making a tenant to the pracipe, and the second son was vouched. The estate was mortgaged in 1759, and the title was then approved of by Mr. Serjeant Hill; and from the wording of his opinion, it was collected, that the settlement of 1705 was then before him. Supposing the limitations in the settlement of 1705 to have been to the sons of that marriage successively in tail male, those estates-tail, and the remainders expectant upon them (if any) were completely barred by the fine and recovery.

(\*) The counsel for the purchaser objected to the title, on the ground that the deed of 1705 was not produced, and that it might contain limitations which were not barred by the fine and recovery; and might have created charges to which the estate still continued subject.

These objections were laid before the Master; and the vendor not acquiescing in them, they were argued before him. The counsel for the purchaser avowed his client to be an unwilling purchaser, and stated his objections with great perspicuity and ability, and required of the Master, that if he did not think the title such as a court of equity was warranted to force on an unwilling purchaser, he should not report in favor of it. The original opinion of Mr. Sergeant Hill could not be produced, and the serjeant had not that recollection of what was before him at the time he gave the opinion, as enabled him to say that he had seen the settlement. Much stress was not, therefore, laid upon the opinion. On the 21st February 1791, the Master made his report, in which he stated that he had seen the opinions given by Mr. Sergeant Hill and by Mr. Shadwell, the purchaser's counsel; and that, considering the circumstances of the case, and the length of the possession since the recovery, he was of opinion a good title might be made. To this report the purchaser excepted, and the exceptions were argued before the Chancellor on the 4th May 1791, by Sir John Scott, with great earnestness; but the Chancellor over-ruled them, and the report was confirmed.

#### No. XV.

# Clay v. Sharpe, Ch. Mich. Term, 1802 (e).

By indenture, bearing date the 28th of November 1798, and made between Thomas Wardell of the first part, George Taylor and Ann his wife of the second part, E. Day of the third part, and William Sharpe of the fourth part, certain leasehold estates were assigned unto the said Edward Day, his executors, administrators and assigns, subject to a proviso or condition for redemption, upon Wardell's transfering into the name

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of Day, his executors, administrators or assigns, 2,000l. 3 per cent. consolidated Bank annuities. And it was by the indenture agreed, that if default should be made contrary to the proviso or condition (\*)of redemption it should be lawful for the said defendant, Edward Day, to sell the said leasehold premises for the best price that could be reasonably gotten for the same; and to reimburse himself the costs, charges and expenses relating to such sale; and afterwards to re-purchase the said 2,000l. 3 per cent. consolidated Bank annuities, or such part thereof as should remain due or untransferred; and the overplus of the monies to arise by the said sale, if any, to pay to the said Thomas Wardell, his executors, administrators or assigns. And the said Thomas Wardell did, by the said indenture, covenant, that in case of any sale pursuant to the power aforesaid, he the said Thomas Wardell, his executors or administrators, would join and concur therein, and execute any assignment to the purchaser or purchasers of the said premises, with the usual covenants for the title thereto; or do any reasonable act confirming such sale. But that, nevertheless, it should not be necessary that the joining of the said Thomas Wardell in any such sale or conveyance, should be essential to perfect the title, the same being intended only for satisfaction of such purchaser or purchasers.

Default was made in transferring the stock, and Day, who was a trustee, by Sharpe's directions, put up the premises for sale by public auction, at which sale the plaintiff became the purchaser.

The plaintiff's attorney prepared a draft of the assignment, in which he made Day the mortgagee, Sharpe the *cestui que trust*, and Wardell the mortgagor, parties; but Wardell the mortgagor having refused to execute the assignment, the plaintiff filed his bill against Day, Sharpe and Wardell, for a specific performance of the contract for sale.

To this bill the defendants put in their answers, and Wardell stated that he resisted the sale, as having been made without his consent, and at an undervalue; but before any proceedings were had, Wardell became a bankrupt, and in consequence thereof a supplemental bill was filed against his assignees.

The cause coming on to be heard the 15th of November 1802, the Chancellor decreed that the plaintiff's bills should be dismissed as against the defendants, Thomas Wardell, and his assignees, with costs, to be taxed by the Master. And it was also decreed, that the agreement entered into by the plaintiff with the defendants William Sharpe and Edward Day, for the purchase of the premises in question, should be carried into execution. And that upon the plaintiff paying unto the said defendants (\*)William Sharpe and Edward Day, the residue of the purchase-money for the premises, the said defendants should execute an assignment of the loase of the said premises to the plaintiff, or as he (\*338) (\*339)

should appoint. And that the defendants Sharpe and Day should pay to the plaintiff his costs of the said suit, so far as the bills were not dismissed, as thereinbefore directed, to be taxed by the Master, in case the parties differed about the same.

#### No. XVI.

## Belch v. Harvey (f), Ch. Mich. 9 Geo. II.

This cause was very long and intricate; but the chief question was, what length of time would bar an equity of redemption? And as to that point, Talbot, Lord Chancellor, said that courts of equity had of late years generally adhered to the time laid down in the statute of limitations with regard to ejectments, and that it was certainly right to have fixed rules in equity as well as law, that people might know how far their property extended, and where it was bound; and that he did not know any more reasonable rule in general than what the Legislature had prescribed for such possessory actions. The person claiming the equity of redemption offered some proof out of the Ecclesiastical Court to show she was an infant at the time of her marriage, which was not allowed to be read, and other proof that the marriage continued for many years, both which, taken together, would excuse the non-redemption for a long time; but my Lord Chancellor gave her liberty to file an interrogatory to prove her infancy at the time of her marriage, if she could; and said, he would then consider whether equity had also followed the statute of limitations in allowing only ten years for infants and femes covert to commence their suits after the imperfections removed, for he did not remember the Court had pursued that part of the statute; and Mr. Verney, king's counsel, cited the case of Brewer and Bakerstraw, which he believed to be about five years ago, where the father mortgaged some chambers in Gray's Inn, and died, leaving his son an infant, during which time many years were saved; and yet nineteen years after he was come of age he was permitted to redeem. But to this Mr. Fazakerly answered, there was as much reason for observing it in the one (\*) case as the other; and that, in the present case, thirteen years had passed between the death of the husband and the bill filed for a redemption. This was on a supposition she could prove her infancy at the time of her marriage; for if she was then of full age, my Lord Chancellor said, the time would attach and run out against her, notwithstanding the subsequent marriage, and then she would be put off from 390 APPENDIX.

all possibility of relief, for there would be near forty years possession against her unaccounted for. By statute 21 Jac. 1. c. 16, persons having any right or title of entry must enter within twenty years after titles accrued; but the title of infants, femes covert, &c. are saved, so as they commence their suits within ten years after the imperfection removed?

This cause coming on again the same term, was ended by consent of the parties: but Lord Chancellor Talbot spoke, however, in this case, to this effect: A peaceable and quiet possession for a long time weighs greatly with me in all cases. The foundation which the Court goes on in cases of the like nature with the present, is not any presumption, that after a long space of time the party has deserted his right; but to quiet and secure men's possession, which is very reasonable to be done after twenty years time, without some very particular circumstances; and for this cause a court of equity has generally acted in conformity to the statute of limitations. Whether the present plaintiff was an infant at the time of her marriage is to me very doubtful; but taking it she was then an infant, as the Court has not in general thought proper to exceed twenty years, where there was no disability, in imitation of the first clauses of the statute, so if I had been forced to have made a decree in the present case. I should have been of opinion, that after the disability removed, the time fixed for prosecuting in the proviso, which is ten years, should also have been observed: for the proviso containing an exception of several cases out of the purview of the statute, if the parties at law should avail themselves by the proviso, they must take it under such restrictions as the Legislature hath annexed to it, and that is, to sue within ten years after the impediment ceases. Why should not the same rule govern in equity? I think there is great reason that it should. The persons who are the subject of the proviso are not disabled from suing, they are only excused from the necessity of doing it during the continuance of a legal impediment; therefore when that difficulty is removed, and nobody can say (\*)how long it may last, the time allowed after such impediment removed for their further proceedings should be shortened. If they would excuse a neglect under the first part of the proviso, should they not do it upon the terms such excuse is given? If I had given my opinion on this case, I should have dismissed the bill.

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#### No. XVII.

The King against John Smith, Esq.(a), Serjeants' Inn Hall, March 2, 1804.—The judgment of the Court, as delivered by the Lord Chief Baron.

This case of the King against Smith has occupied a great deal of the attention of the Court, and that in a great degree owing to the prodigiously extensive consequences that it may have according as it is decided in the one way or the other. We were therefore anxious to search in order to find out what materials existed on the subject. After all the pains we could take, we find them to be but few. We have found no decision or authority similar in its terms to the present case: and the consequence of that is, where we can find principles laid down, we must be governed by them in the absence of every direct precedent on the subject. The magnitude of the question is very considerable, because, on the one hand, from some instances of persons in the service of government, and who have been intrusted with the public money, I have experience enough to say, that the ingenuity exercised by them may be such as not to make it very difficult to avail themselves of their situation, and to render it no easy matter to make them responsible; on the other hand, it puts those who make purchases from persons in such a situation in a very unpleasant and precarious situation, if the lands or goods so purchased may be extended. In this view the question is of very great importance. The stake in the present instance is next to nothing; but the decision will be such as will govern multitudes of cases that exist, and I believe many to exist of the same sort.

This case arises on an extent that was issued against John Montresor, Esq. late engineer in the service of government, in North America, who owed vast sums to government. It was found that a great balance remained in his hands which he had not accounted for. The extent issued to the sheriff of Kent—that you diligently inquire what lands and tenements, and of (\*)what yearly value, the said John Montresor had in your bailiwick on the 28th of September, in the eighteenth year of our reign, when the said John Montresor first became indebted to us in the said money, or at any time after; in the common language.

An inquisition is returned of course, and in the inquisition it is stated that the sheriff seised, &c.

Without going minutely into all the circumstances of this case, I believe I can state from memory, the leading facts upon which the question depends. The property now in question, which consists of a small

messuage, and of some closes of land, originally belonged to a Mr. Thompson. He being seised of this property demised it for the full term of five hundred years; the residue of this term was afterwards assigned to Ann Carter; and last of all to John Smith, the present defendant, in trust. And in 1795, Mr. Smith purchased the reversion of General Montresor, he being then seised of this property in his demesne as of fee subject to this term of five hundred years; and at the time of the purchase Mr. Smith had no notice of any debt that had been incurred by John Montresor to the King.

This is the short state of the case, and I believe it is all that is necessary: and the question then is, whether this outstanding term, which is held in trust for Mr. Smith, does or does not protect him against the claim of the Crown?

The argument on behalf of Mr. Smith turned almost entirely on the statute of uses in courts of equity, and besides that on the doctrine laid down in Willoughby against Willoughby, which has never been shaken, and which I hope never will. I take that now to be a leading decision, never to be departed from in cases between subject and subject.

In answer to this case, made on the part of the defendant, irrefragable as between subject and subject, in answer to this case, it was argued, that the case of the Crown is essentially different from that of the subject; and as far as we are furnished with light on this subject, it does seem that the case of the Crown is essentially different.

In the first place, we find from a variety of authorities, that lands or goods in the hands of debtors or accountants to the Crown, or in the hands of those who are debtors to the debtors of the Crown, or which are held in trust for them, or to their use, are most clearly the subject of an extent.

Further, we find in Pl. Com. 321, in the great case of the mines in the hands of the Crown, there was a great number of (\*)the King's debtors brought into the Court of Exchequer, and there the Court held, that lands which had belonged to the king's debtors, which had been their property after they had so become debtors to the Crown, were subject to the seizure of the king, into whatever hands they afterwards came, whether by descent, purchase or otherwise. Among other cases there cited, is that of Sir Wm. Seyntloo, who married the widow of Sir Wm. Cavendish, who was treasurer of the household. Sir Wm. Seyntloo and his lady were returned terre-tenants, in right of the wife, of certain land which was Sir William Cavendish's, and were called into the Court of Exchequer, and made accountable for the arrears due to the queen for Sir William's office. See Dyer, 224 and 225. It appears from the case, that after Sir William Cavendish became indebted to the Crown, he purchased divers lands, and afterwards aliened them,

and took back an estate therein to himself and his wife, and afterwards died without rendering any account, and the terre-tenants (as I have just stated) of the land were charged to answer to Queen Elizabeth for the arrears. These lands might have been seized in the hands of Sir William, and for the same reason they might be seized in the hands of every one who came under him.

In 2 Roll. Ab. 156, the difference is stated between the effect of a sale of land by a debtor to the Crown, when that sale took place before he became a debtor, and a sale afterwards. In Dyer, 160, there is the case of one Thomas Favell, who was a collector of the fifteenth and tenth. He was indebted to the Crown, and being seised of certain lands in fee simple, and having divers goods and chattels, die intromissionis de collectione et levatione, of the fifteenth and tenth aforesaid, in extremity of illness aliened his tenements, goods and chattels, to divers persons, and died without heir or executor, and process was issued against the terre-tenants, and possessors of the goods and chattels, to account for the collection aforesaid, and to answer and satisfy the king thereof, &c.; and this by the advice of the Chancellor of England, and the Chief Justice of England, and the other Judges of either bench. It is therefore clear, beyond all doubt, that the land itself may be extended, into whatever hands that land may have been aliened.

The next step which we find in a matter of this kind, is the doctrine which is laid down in Sir Edward Coke's case, and which is mentioned afterwards by Lord Hale in deciding another case, which I shall state by and by. This case of Sir Edward (\*)Coke being of great consequence, the Master of the Court of Wards was assisted by four of the Judges in the hearing and debating of it; and after many arguments at the bar, the said four Judges argued the same in court, viz. Dodderidge, one of the Justices of the King's Bench; Tanfield, Lord Chief Baron of the Exchequer; Hobart, Lord Chief Justice of the Court of Common Pleas; and Ley, Lord Chief Justice of his Majesty's Court of King's Bench.

First of all, I would draw your attention to this point, that this is an infinitely stronger case than any of those I have stated. In general, the debtor to the Crown was at one time in possession of the land himself; but in this case the king's account never had the land in him, the land and debt never centered in the accountant to the Crown.

The case in effect was this:—Queen Elizabeth, by her letters patent, did grant to Sir Christopher Hatton the office of remembrancer and collector of the first fruits for his life, habendum to him after the death or surrender of one Godfrey, who held the said office, then in possession: Sir Christopher Hatton being thus estated in the said office in reversion, and being seised in fee simple of divers manors, lands and

tenements, did covenant to stand seised of his lands, &c. unto the use of himself for life, and afterwards to the use of J. Hatton, his son, in tail, and so to his other sons in tail, with remainder to the right heirs of J. Hatton in fee, with proviso of revocation, at his pleasure, during his life. Godfrey, the officer in possession, died, and Sir Christopher Hatton became officer, and was possessed of the office, and afterwards he became indebted to the queen by reason of the said office: and the question in this great cause was, whether the manors and lands which were so conveyed and settled by Sir Christopher Hatton, might be extended for the said debt due to the queen, by reason of the proviso and revocation in the said conveyance of assurance of the said manors and lands. The debt due to the queen was assigned over, and the lands were extended, and the extent came to Sir Edward Coke; and the heir of John Hatton sued in the Court of Wards to make void the extent; and it was agreed by the said four Justices, and so it was afterwards decreed by Cranfield, Master of the Court of Wards, and the whole Court, that the said manors and lands were liable to the said extent.

The Judges on that occasion cite a great number of cases, and some of them go a great deal farther than I could have well (\*) expected. I shall just mention two or three of them, and it will be unnecessary to state more. One of the cases there cited is, that of Walter de Chirton, customer, who was indebted to the king 18,000l. for the customs, and purchased lands with the king's money, and caused the feoffor of the lands to enfcoff certain of his friends, with an intent to defraud and deceive the king; and notwithstanding he himself took the profits of the land to his own use, and those lands upon an inquisition were found, and the value of them, and returned into the Exchequer, and there, by judgment given by the Court, the lands were seized into the king's hands, to remain there till he was satisfied the debt due to him; and yet the estate was never in him; but because he had a power (to wit), by subpæna in chancery, to compel his friends to settle the estate of the lands upon him, therefore they were chargeable to the debt. See Dyer, 160. Walter de Chirton, in that case, never was seised of the said lands; Chirton had no remedy in law to have the lands, but his remedy was only in a court of equity.

Another case is that of Philip Butler, who was sheriff of a county; and being indebted to the king, his feoffees were chargeable to the king's debt by force of the word habuit, for habuit the lands in his power. In Morgan's case, it was adjudged, that lands purchased in the names of his friends to his use, were extendable for a debt due by him to the king.

There are several other cases cited in Sir Edw. Coke's case, and which are also mentioned by Lord Hale in the case to which I have al-

ready alluded. In a great many of these cases, the lands that were seized for the payment of debts due to the Crown had been held in trust for the king's debtors; and it was no objection that the legal estate was not in them. The ground of decision there was, that they, by an act of their own, might at any time reduce it into possession; they had it in their power, viz. by a subpœna in chancery, &c. to compel their friends to settle the estate of the lands upon them, and therefore they were made chargeable to the debt.

This being an outstanding term held in trust, it is analogous to all the cases of uses and trusts. It was held there to be no objection, that the legal estate was not in him, because it was in his power, by an act of his own, to reduce it into possession.

But the case that comes nearest to the present is that of the Attorneygeneral against Sir George Sands.

Upon an information exhibited here, and proceedings upon (\*)it, a case was made and stated, which was to this effect, viz. Sir R. Freeman purchased lands for the term of ninety-nine years, in his own name, and afterwards purchased the inheritance of the same lands in trust, and then by his will disposed of these lands to the sons of Sir George Sands, his grand-children, born, or which should be born in his life-time, and directed conveyances to be made accordingly by his trustees, and died. At that time Sir George Sands had two sons, Freeman and George, and Freeman died; and after the death of Sir Ralph, Sir George had another son, Freeman, who killed his brother George, for which he was attainted and executed, and no conveyances were made by the trustees, pursuant to Sir Ralph Freeman's will; and the questions hereupon were two: 1st, Whether, as this case is, the term for years was forfeited?

The result in this case was, that, inasmuch as there did not appear to be a tenure, there could be no forfeiture for the felony; because to a forfeiture for felony, and to an escheat, a tenure is requisite, and therefore judgment was afterwards given quod defendens eat inde sine die.

This case of Sir George Sands is reported in Hardres, 488, and also in Freeman. I mention this case with greater confidence, because, though Lord Mansfield, in the case of Burgess against Wheate, I Blackst. Rep. 123, observes, in delivering his judgment, that it was a family business, and that the circumstances of Sir Geo. Sands' case were compassionate; yet I have the authority of Lord Keeper Henley for saying it was decided on great principles of law.—Having this authority with me at this great distance of time, I conceive it gives it the description I have now mentioned.

Hale, Chief Baron, says, there is no question concerning the forfeit(\*346)

ure of the fee simple in trust, for that must arise by escheat, and there can be no escheat, but pro defectu tenentis. But here is a tenant in esse. If the offence committed had been treason, then there might have been a question, whether the inheritance in this case should be forfeited, in respect that the rent and tenure have a continuance. But whether Sir George Sands shall hold the land discharged of the lease, or that the king shall have the term, is the sole doubt. The king does not gain an interest in a trust by forfeiture, as he does in debt; for there the interest of the bond passes to the king, and process lies to execute it in the king's own name. And it is questionable, (\*) whether the king can have this in point of prerogative, in case of felony; though perhaps more might be said, if the case had been treason. It is the intention of the party that creates and governs uses and trusts; and therefore a lease shall be deemed to attend the inheritance, if it appears the parties intended it should do so, as here it does; and then it is no more than a shadow, an accessary to it, for otherwise it would not be attendant on it. And then it cannot, in this case, go to the felon, but to the admistrator of George, the son. And here they are consolidated by the intention of the will, which directs that the trustees shall make conveyances accordingly. Nor is it kept on foot, but only to avoid mesne incumbrances, which might affect the inheritance. And this appears to have been the intention of the parties, when the fee was purchased, and therefore the lease ought to go with the fee; and in the cases of leases for years in trust, that have been forfeited, fraud was the ground of it in the cases that have been cited.

Lord Hale says on another occasion, (for this case was twice spoken to by the Court, I agree, that in the case of the king's debtor, lands in trust for him in fee simple are liable to the king's debt by the common law, per cursum scaccarii, which makes the law in such cases; and this appears by precedents temp. Henry VI.; and before 4 Henry VII. a trust or use was liable to a statute; and that is the reason of Chirton's case in 50 Ass. And it was held, in Sir Edward Coke's case, in Curia Wardorum, that if the king's debtors have a power of revocation, that makes them liable to the king's debt; and that was the reason of Babington's case, in Curia Wardorum, in 30 Car.; and of Hoad's case, in Pasch. 4 Jac. where lands in trust for a recusant were subjected to the debt of 201. per mensem: so, in 41 Eliz., Babington's case, a trust liable to a debt imprest, because cestui que trust has a profit by it, but that is a special case, and grounded on a special course in the Exchequer. He proceeds to state many other cases, which I think it unnecesary to mention.

If you take the converse of this case, I think it will make it still more (\*347)

clear. The reason why the term was not forfeited, was, because the inheritance thereof was not forfeited; but if the inheritance had been forfeited, the term must have been forfeited. In deciding according to the course of the common law, I therefore think it clear that an outstanding term cannot defeat the king's process by extent. In courts of equity, it has been said that a purchaser without notice is a person favored by (\*)that Court. Perhaps it may be a sufficient answer to say, that in the present instance we are not in a court of equity. The question is, What ought to be our decision according to the common law? This question could not be decided in a court of equity: they could not sue for a decree. When a court of equity is resorted to, and this is the situation of the parties, the Court does nothing but stand neuter between such parties, and leaves them to make the most of it.

Now, therefore, I think, on the whole, in the first place, the land is chargeable that has been in the hands of the king's debtors; and from the cases that have been decided, it is sufficiently clear that the term is; it is the whole interest in the land, whether it be divided or not: and so likewise in uses and trusts; and from what is said by Lord Hale, I infer the same doctrine is applicable to the actual case now before us.

It was hinted, that the 33 Hen. VIII c. 39, sect. 50, 53, and 74, puts the king's debts on the same footing as a statute staple; but we find the same difficulty again recurs, for the 33d of Hen. VIII. does not alter the subject out of which the thing is to be paid. If I suppose, in the present instance, they are put on the same footing with statutes staple, the question would return; supposing the king has a debt upon bond, which is to be treated as a statute staple, I do not find the act meddles with the subject out of which he is to compel the payment of his debt, but the act relates singly to the mode by which he is to do it; and if the king were to put it on the footing of a statute staple, it would deprive him of no remedy which the common law gave him. The subject is not at all touched by the statute, but merely the manner in which he is to proceed, which perhaps gives the subject rather more advantages than he had before, though I do not see very clearly in what respect the situation of the king's accountant is altered.

Now that being so, it should seem to be the result of what one finds in the books, that of the king's common-law remedy it is impossible to doubt; and that remedy is given in every case where the party who is indebted to the Crown has a present beneficial interest, as well as a reversion: both of these are considered as chargeable for the debt of the Crown; the lands of the king's debtor may be extended by the Crown, in whatever hands they may be found, and therefore, upon the whole, the judgment of the court in this case must be for the Crown.

Judgment for the King.

## (\*) No. XVIII.

The Attorney-General v. Lockley and others(b). Chan. Mich. 9
Geo. II.

This was an information brought to secure a charity, and the case was thus: John Radford, and Anne his wife, were seised in fee, and conveyed the premises by fine and deeds, declaring the uses thereof, to their trustees and their heirs, to the use of them and their heirs, in trust for John Radford and his wife, and the survivor of them, and the heirs of the survivor, with power for the wife, in case the husband survived her, to charge the estate with 400l. The wife died first, and executed her power for charitable uses; John enjoyed the estate during his life; and by will, dated 25th Jan. 1723, he devised the premises in fee to Tuder Lockley. Now this estate was to be sold for discharging the charity and payment of mortgages made by Tuder Lockley: and the question was, whether the sale should be subject to the dower of Tuder Lockley's wife, in case she survived her husband. It was argued by Noel in favor of dower, and by Verney against it; and the following cases were cited: Preced. Canc. 241, 250; Banks and Sutton at the Rolls, March 1733; Preced. Canc. 336; Chan. Rep. 369; Show. 111; Preced. Canc. 65; Cro. Car. 901; Ambrose and Ambrose, determined in the year 1717, in the House of Lords(I).

Talbot, Lord Chancellor.—This is a considerable point, and should be settled some way or other; in the first place with regard to the wife, her demand is properly a legal one, and it has been hinted at, as if the legal estate was executed in Mr. Tuder Lockley; but there is no foundation for that, as the estate is limited to trustees and their heirs; therefore it is a legal estate absolutely executed in the trustees, for there cannot be a use limited on a use. Then the question will be, whether Tuder Lockley's (\*) wife is entitled to dower of an equitable estate of inheritance vested in her husband; for at present the husband is living, and if the wife died before him, then this question never can arise. As dower is a legal demand, so clearly, with regard to a use, a wife was not dowable of it before the stat. Hen. VIII. Vernon's case, 4 Co.

1. Then how can she be dowable of a trust after that statute? For is

### (b) Vide supra, vol. 1. p. 517, n.

<sup>(</sup>I) This is the case in 1 P. Wms. 321. The case was that the deceased husband bought an estate in the name of a third person. The Court considered it clear that the wife was not dowable of the trust estate. It appears by the report, that the decree was affirmed in the House of Lords. I find by the Journals of the House of Lords, that the wife prayed that the estate might be deemed part of the personal estate of her husband, or at least that she might be entitled to her dower out of it. See Journ. Dom. Proc. vol. 20, p. 456.

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there any solid distinction between a use before a statute and a trust after it? What was a use but a right to receive the rents and profits of lands of which the legal estate was in another? And a trust is the very same now: and if before the statute the right of the wife was considered strictly as a legal right, so that the equitable interest was not affected by it, the reason holds equally strong since the statute. that courts of equity should follow what was the rule before the statute with regard to those estates. How there came to be a difference as to estates by curtesy, I cannot tell; nor how it came to be extended to estates by curtesy, and yet not to dower, I cannot tell. I do not see, on this general question, whether a wife shall be endowed of a trust estate of inheritance, that there is one case, from the time of the statute H. VIII. to this time, that is directly in point, except the case of Fletcher and Robinson, Preced. in Canc. 250. That case is extremely short; and the reason given for it is, whether it be a good one or no I shall not say, that the conveyance was considered as fraudulent, being done with an intent to prevent a forfeiture; and therefore, in that case, the Court seems to have disregarded it, which shows it was not determined simply on this point, but on other matters, which do not fall in with this case. The case of Banks and Sutton seems to have been determined on this, that the time of the conveyance was come, and the husband had a right to call for it; and then the Court, upon considering that as done which ought to have been done, might properly assist the wife in that case. The case of Bottomley v. Fairfax, Preced. in Canc. 336, before my Lord Harcourt, is an express authority that a wife is not dowable of a trust estate of inheritance; and to this it may also be added, that it is the general received opinion of every one who has attended this bar constantly, that they are not; and it is the practice to make purchases in the name of the purchaser and trustee-but to what intent or purpose? Only to prevent dower, that by there being a survivor to the purchaser, his wife might not be entitled to it. But if it should be ruled, that a wife is entitled to a dower of a trust estate of inheritance, provisions (\*) of this kind would be overthrown. I mention this, because it is hinted at, as if the practice of conveyancers was not of great weight; and truly it is not in their power to alter the law: but when there is a received opinion, and conformity of contracts and settlements thereon, it is extremely dangerous to shake it, which would disturb the possession of many who are very quiet, and think themselves very secure; therefore it ought to be done only on the clearest and plainest ground. In the present case I cannot say they are mistaken, because they have gone on this ground, that trusts are now what uses were at the common law, where a wife was not dowable of a use. There are other cases

where terms for years have been carved out, and the inheritance remains in the husband, and as to those there is no difficulty. Where the term is created for particular purposes, and the inheritance remains in the husband, and descends to his heir, which term is not a bar at law of dower, but only prevents the execution of it till the term is expired, there the term may be redeemed; and that was the case of my Lady Dudley, Preced in Canc. 241. There the express limitation of the term was to the owner of the freehold after the trust expired. As to those cases where the inheritance is sold for a valuable consideration, (Preced. in Canc. 65,) which was the case of Lady Radnor, and the purchaser took an assignment of the term, if it was without notice, there could be no difficulty; but whether that case was so or not, I do not remember. But the present case is not that of a wife entitled to dower with a cessar executio; for the question here is, whether the wife is dowable of an equitable estate of inheritance in fee simple? As to what is said, that this is to be considered as a contract on the part of the wife, therefore equity should supply it; the answer is, equity, where there is a valuable consideration, will supply form. But hath she contracted for this particular estate? No, for nothing but what the marriage implies, which is that she shall have dower of what she is dowable by law: and then the question comes to this, whether she is dowable by law of a trust? Here she could have nothing of this in contemplation at the time of her marriage: for the equitable interest was left to her husband, long after the time of her marriage, which was in 1713; and the equitable estate was not given him till 1723. Therefore the decree must be, that the land shall be sold and enjoyed, discharged of any claim of dower.

In another manuscript note of this case, Lord Talbot is (\*)reported to have said that trust estates, since the statute of uses, ought to be considered as uses, before the statute, of which estate a woman could not be endowed; that the case of Bottomley and Lord Fairfax was express in point; that, as this method of conveying on purpose to prevent dower, had been used for so many years, a court of equity ought not to make a decree which would overturn such a number of settlements. And the reason of the decree in the case of Banks and Sutton (which he stated) was different: for there the direction of the will was, that the legal estate should be conveyed to Sutton; and the wife married him on the expectation of that estate, and it was a fraud in the husband not to call for the settlement. The other cases of dower of trust estates are, where terms are created for particular purposes, and the inheritance remains in the husband: in these cases she has a title of dower, and so she may come into this Court and redeem the term, which is the case of Lady Dudley.

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#### No. XIX.

Bret v. Sawbridge and others(c). Before the Master of the Rolls.

Sir John Wroth was seised in fee of the lands in dispute, and mortgaged the same for one thousand years to Francis Hill, as a security for 1,100l., which, by several mesne assignments and further charges, to the amount of 2,400l. in the whole, came to Richard Watson, in trust for Sir Edward Bret; and Brewster (who assigned the same to Watson), covenanted that Sir John Wroth, or his heirs, should convey the inheritance to Sir Edward Bret: and Sir Edward Bret, reciting by his will, that he had purchased of Brewster the residue of the said term of one thousand years, and that there was a covenant in the purchase deed from Brewster as aforesaid, but that Sir John Wroth dying before the conveyances were executed, and leaving an infant of eight years old. his heir at law, it was then impossible to have the fee conveyed: therefore Sir Edward Bret declared it to be his will, that when the heirs of Sir John Wroth should attain the age of twenty-one, a conveyance should be executed according to the settlement in tail after mentioned; and he devised the same to John Bret Fisher for life, remainder (\*) to trustees, to preserve contingent remainders; remainder to his first and every other son in tail male successively; remainder to Nathaniel Fisher for life, and in the very same manner; and so to Edward Fisher; remainder to the right heirs of Stephen Beckingham and Richard Watson (the trustees of the term), whom he made his executors; and then he directed the remainder of the term should remain, and be attendant on the inheritance, according to the limitations above mentioned: and all other his real and personal estate he devised to John Bret Fisher, Nathaniel and Edward Fisher. Upon the death of Sir Edward Bret, the executors proved the will; and afterwards Nathaniel and Edward Fisher died intestate, without ever having any issue; and John their brother took out administration to them. John Bret Fisher, thinking the limitations over to the right heirs of Beckingham and Watson void. took himself to be absolute owner of the term, as co-residuary legatee, and representative of the other two his brothers, in case he should ever die without having issue, and mortgaged the residue of the term for one thousand years to the defendant Sawbridge, as a security for 350l. One Newland purchased the reversion, and the equity of redemption, from the right heirs of Sir John Wroth, for one hundred broad pieces; but before the purchase, he promised John Bret Fisher should have the benefit of it, if he would pay him the purchase-money, his expenses, and a small

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gratuity: however, John Bret Fisher, a long time after the purchase was completed, neglected to comply with the terms, and so it was sold to the defendant Sawbridge. John Bret Fisher, by his will, devised all his real and personal estate to the defendant Sawbridge, and made him his executor, and afterwards died without ever having issue.

The plaintiff filed his bill, to have the estate conveyed to him according to the will of Sir Edward Bret, all the precedent limitations being spent, and to have an account of the rents and profits, he being heir at law, and also representative of the personal estate of Richard Watson, who died in the life-time of John Bret Fisher: but Stephen Beckingham is still alive, and made a defendant in this cause.

Sir Joseph Jekyll, Master of the Rolls, after argument on both sides, and time taken to consider of it, delivered his opinion to the effect following: The plaintiff in this case does not want to have the term assigned to him, because he has the legal interest of it in him, as representative of Richard Watson, who was a (\*) trustee of the same for Sir Edward Bret. Then the point to be determined is with regard to the account of the rents and profits. Though Brewster covenanted that Sir John Wroth, or his heirs, should convey the inheritance to Sir Edward Bret and his heirs, yet it does not appear that Sir John Wroth was under any obligation to convey the same; for he was no party to the conveyance to Sir Edward Bret, nor did any thing to show his agreement thereto: but the covenant of Brewster to Sir Edward Bret, being before the statute of frauds, there might be a parol agreement by Sir John Wroth that he would convey, and it would be good; otherwise it would be difficult to account why Brewster should enter into such a covenant. However, Sir Edward Bret, by his will, desiring the heirs of Sir John Wroth to convey the inheritance, and directing the limitations of the same, and that the term should be attendant on it, did intend to devise the inheritance, and not the term in gross. But it is said, though the inheritance cannot pass, the term may, according to the limitations in the will of Sir Edward Bret. It is not necessary now to enter into the question how far limitations of terms are good, or whether, by such limitations as those in the present case, all the prior devisees dying without having had issue, the remainder of this term could vest in the plaintiff as to one moiety. But if I was to deliver my opinion about it, I should be under great difficulty: for on this point there is the opinion of one Lord Chancellor against another; my Lord Cowper, in the case of Higgins and Dowler, 2 Vern. 600, and Salk. 156 held such remainder of a term to be good, all the parties dying without ever having any issue: and by the present Lord Chancellor, there have been two cases determined, Clare and Clare, P. 7. G. H. Saberton and Saberton, 8 G. II. In one of them it may be taken, there was an estate (\*354)

tail in the first taker; but in the other it seems not to be so; but in both of them my Lord Chanceller held such limitations of estates tail, though to persons not in being, and never vesting, to be too remote, and so delivered his opinion. Higgins and Dowler, as it appears to me, was not clearly stated and urged, but was taken as it is reported in Salk. and Vern., which my Lord Chancellor said was incorrectly done in both of them: but I have a complete report of it by two gentlemen; and in the case of Stanley and Lee, M. S. G. II., I looked into the pleadings and the Register's book; and on the whole matter I find the judgment of my Lord Cowper was, that such limitations never having been in (\*)esse, and so not vesting, the limitation over might be good. is one case I did not mention, when I gave my opinion in Stanley and Lee, and that is Massenburgh and Ashe, Chan. Rep. 275, in which the Judges were of opinion, that the limitation of a trust of term must be considered as limitations of a term at law; and that case is stronger for allowing limitations over than this, though that was on a deed, and this is on a will, which has a more favorable construction. But I must leave this point of the limitations of a term for future consideration, if ever it comes before the Court, for this case will turn on a different point(I). Here Sir Edward Bret thought he was

<sup>(</sup>I) It is very satisfactory to find that Sir Joseph Jekyll did not give up his opinion in Stanley v. Lee. The doctrine in the case of Stanley v. Lee (2 P. Wms. S. C. MS.) is now well established, and the case of Clare v. Clare (For. 21, S. C. MS.) is overruled by a series of authorities. See Sabbarton v. Sabbarton For. 55. 245. S. C. MS.; Knight v. Ellis, 2 Bro. C. C. 570; Phipps v. Lord Mulgrave, 3 Ves. jun. 516. The rule, as now settled, is accurately stated by Mr. Fearne—Whatever number of limitations there may be after the first executory devise of the v.hole interest, any one of them, which is so limited that it must take effect (if at all) within twenty-one years after the period of a life then in being, may be good in event, if no one of the preceding executory limitations, which could carry the whole interest, happens to vest; but when once any preceding executory limitation, which carries the whole interest, happens to take place, that instant all the subsequent limitations become void, and the whole interest is then become vested. Exec. Dev. 4th edit. 415.

In a former edition of this work a discussion was introduced, in this place, on the question, whether the term of twenty-one years, after a life in being, could be taken as a term in gross in the case of an executory devise. This will now be found in n. (2) to the last edition of Gilbert on Uses, p. 260. The case of Beard and Westcott, there mentioned, was fully argued before the Master of the Rolls, upon the certificate being returned; and on the 17th Dec. 1811, the Master of the Rolls gave the following judgment :- "This case stood over in consequence of a suggestion, that the certificate of the Court of Common Pleas involved in it the decision of a new question, which had not undergone any particular discussion, or received any particular consideration in that Court: namely, how far the validity of a limitation over, by way of executory devise, is affected by the circumstance that the period of 21 years, after the duration of an estate for life, has not any connection whatever with the minority of any person taking an interest under the preceding limitations. Now I do understand, that the question certainly did not receive any particular consideration in the Court of Common Pleas, it being taken for granted that the rule upon this subject stood as it is commonly laid down in the books: namely, that the executory devise falls within the allowed limits, if the event upon which it is to take place must happen within a period of 21 years after the life or lives in being. I am not aware, however that the point has been directly decided; and Lord Alvanley's doctrine in the case of Thellus-(\*355)

(\*)entitled to the trust of the inheritance, and did not intend to devise the term in gross, but intended to devise the inheritance, and (\*)that it should attract the term; Whitechurch v. Idem. 10th Feb. G. I. A man being seised of a reversion in fee, and having the trust for a term for years to attend it, made a will of his own hand-writing, and thereby carved out several limitations of the land and premises, not un-

son and Woodford, is against the addition of 21 years, except by way of provision for the circumstance of the devisee being under age, or in ventre sa mere at the expiration of the life or lives in being .- And as the question has now been raised, and as there is that degree of sanction to the doubt, it does seem to me desirable, that it should be set at rest by the decision of a court of law; so, therefore, I propose to send the case back again to the Court of Common Pleas, to call their attention to the point, that they may have an opportunity of pronouncing an explicit opinion upon it. I have received this information from some of the Judges."-The case was accordingly sent back to the Court of Common Pleas, who refused to hear it argued, until the point upon which their opinion was required was stated. Thereupon, the fellowing question, with the approbation of the Master of the Rolls, was stated to be the question for the opinion of the Court: "How far the limitations over, in the event of there being no son or sons of John James Beard, nor issue male of such son or sons living at the death of the said John James Beard; or there being such issue male at that time, they shall all die before they attain their respective ages of twenty-one years, without lawful issue male, are affected by the circumstance, that they are to take effect at the end of an absolute term of twenty-one years, after a life in being at the death of the testator, without reference to the infancy of the person intended to take, or by the circumstance, that there may be issue of John James living at his death, to whom the estate is given by the will (but who would be incapable of taking according to the above certificate), for whose death, under twenty-one, the limitation over, in the event before mentioned, must await."-The case has since been argued before the Judges of the Court of Common Pleas, and they certified, that the limitations over, in the event of there being no son or sons of John James Beard, nor issue male of such son or sons living at the death of John James Beard, or there being such issue male at that time, they shall all die before they attain their respective ages of twenty-one years, without lawful issue male, are not affected by the circumstance, that they are to take effect at the end of an absolute term of twenty-one years, after a life in being at the death of the testator, without reference to the infancy of the person intended to take, nor by the circumstance that there may be issue of John James Beard living at his death, to whom the estate is given by the will, but who would be incapable of taking according to the former certificate from the Judges of this Court, for whose death, under twenty-one, the limitation over, in the event before mentioned, must await. The case is now reported in 5 Taunt. p. 393. It has been argued before the Lord Chancellor, who sent the case to the Court of King's Bench. It was argued in that Court, and the Judges certified, that John James Board, the grandson and heir at law of James Beard the testator, took, under the said testator's will, an estate for ninety-nine years, determinable with his life, in the freehold estates devised to him in the first instance, and also in the leasehold estates, if they should so long continue; and that upon his death, leaving one or more sons, his first son will take an estate for ninety-nine years, determinable with his life, in the freehold estates, and what shall then remain of the terms for which the leasehold estates are held. And that all the limitations, subsequent and expectant upon the limitation to the first son of John James Beard, are void; 5 Barn. & Ald. 801; and that certificate has been confirmed by the Lord Chancellor, I Turn. p. 25. The point has again been agitated in the case of Bengough v. Edridge, which now stands for judgment, and will be carried to the House of Lords. In that House it has been decided that the limit is a life or lives in being and twenty-one years afterwards, without reference to the infancy of any person whatsoever; but that is the limit, and the period of gestation is to be allowed in those cases only in which the gestation exists. Bengough v. Edridge, 1 Sim. 173. Cadell v. Palmer, 10 Bing. 140.

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like those now in question; but did not publish it in the presence of witnesses; and the doubt was about the limitations of the term; for the will could not pass the inheritance, being not executed according to the statute of frauds. But it was insisted, it might carry the term as the personal estate, upon which the opinion of the Court was taken. But it was determined, it should not pass, because the devisor intended to pass an inheritance, and the writing under the testator's own hand was looked on as an inchoate act to pass the inheritance, and therefore could not operate on the term. Besides, the testator in that case having prepared a writing which was intended to be executed according to the statute, there was no notice taken of any term that should be attendant on the inheritance, as there is in the present case, which makes it stronger against the plaintiff than it was in that case. That case looks like an authority that must govern the present case; for though Sir Edward Bret was not entitled to the trust of the inheritance, yet he thought Sir John Wroth was bound to convey, and on that assurance and persuasion made his will and intended to pass it as an inheritance. There are several cases where a man intended to pass something, and yet the law will not allow it; as in case of a devise, where there is an uncertainty either of the person or the thing, à fortiori here it should be void, because the testator intended to pass what he had not, for he intended to pass the inheritance when he had it not; and there is a great difference between real and personal estates, as to being assets or not, and also as to the course of succession to whom the same shall go after the death of the owner; and there is likewise a difference where a will is made as to the limitations of the one and of the other; therefore when the testator intended (\*)to pass an inheritance and had it not, there is no reason to suppose he designed to pass a term in gross; for he says the term shall be attendant on the inheritance according to the limitations mentioned in the will; and so, as to passing the term, the testator had not animum testandi: therefore I conceive the bill must be dismissed.

### No. XX.

Forshall v. Cole and Short (d), Ch. 27th Nov. 1733. The Master of the Rolls sitting for the Chancellor.

Bill was brought to have a bond delivered up, and proceedings at law upon it to be stayed. The bond was entered into on this occasion: one Durant, in 1728, made a mortgage to plaintiff, but, before this, had given a bond to Cole for 200l. Cole, in 1725, obtained judgment upon

his bond, and afterwards, since the date of the mortgage, took out an elegit, and extended the mortgaged premises towards satisfaction of his judgment; upon this, plaintiff, to save expense and discharge the lands, gave Cole a bond for the 200l. and interest; but it was agreed between them, that the bond should be deposited in Short's hands, and only to be made use of if Cole's judgment was entered so as to affect the lands precedent to plaintiff's mortgage. The judgment was signed in 1725, but not docketed, secundum stat. 4 & 5 W. & M. c. 20, till 28th January 1730.

Upon reading the statute, the Master of the Rolls was of opinion that judgments cannot be docketed after the time mentioned in the act, viz. the last day of the subsequent term in which they are entered, and that the practice of the clerk's docketing them after that time is only an abuse for the sake of their fees, and ineffectual to the party; and he said he would speak to the Judges about it.

Solicitor-General.—It is proved in the cause, that the mortgagee had notice of the judgment at the time of the mortgage.

Master of the Rolls.—Notice is not material, the statute not making a difference between a mortgagee with notice or without; and besides, the notice which the act requires is the docketing, which by the act is become a constructive notice; and therefore he decreed the bond to be delivered up and cancelled, and that the plaintiff should have his costs both at law and in (\*)this Court, and that the 10l. which plaintiff had paid upon the bond, should be returned, which he said the attorney concerned in entering the judgment ought to pay out of his own pocket; and that he believed an action on the case would lie against him, for he believed it was owing to his negligence that the judgment was not rightly entered: and the defendant Short having delivered up the bond to Cole, and permitted him to proceed at law upon it, contrary to his trust, he decreed costs as against him likewise.

#### No. XXI.

Burton and others v. Todd. Todd v. Gee and others (e).

31st March 1818. Judgment by Sir Thomas Phuner, Master of the Rolls.

These two causes are now to be disposed of. The first cause was instituted in May 1804, by Messrs. Gee and Osborne, and Mrs. Burton, the trustees under the will of Mr. Burton, against Mr. Todd, for a

specific performance of an agreement to purchase an estate; which agreement was entered into in August 1802.

In June 1806, the common order for a reference to the Master, whether a good title could be made to the estate, was obtained by the plaintiffs in this suit.

In Dec. 1807, the Master made his report that a good title could not be made. To this report the plaintiffs took an exception, which was overruled in May 1809; no further proceedings have been taken in this suit.

In October 1808, Mr. Todd instituted a suit against Messrs. Gee and Osborne, the trustees, and against the persons interested in taking the accounts under the will of Mr. Burton, to have the necessary accounts taken, and for a specific performance of the agreement, and for a compensation as to the two hundred and twenty-seven acres in the agreement mentioned to be tithe-free, or subject to a very trifling modus.

In December 1813, a decree was made in this cause, whereby it was referred to Mr. Steele to take the necessary accounts and inquiries, in order to ascertain whether a good title could be (\*)made to the estate in question; and to state whether a good title could be made thereto.

In December 1816, the Master made his report; stating, that a good title could be made to the estate in question, except as to the two hundred and twenty-seven acres in the agreement mentioned to be tithefree, or subject only to a very trifling modus, and which the Master reported not tithe-free, or subject to a very trifling modus.

The decree, therefore, in the second suit is nearly of course. The plaintiff, Mr. Todd, is entitled to a specific performance, and to a compensation for the tithes of the two hundred and twenty-seven acres. The only questions are, 1st. As to the principle on which the account must be taken: and 2dly, As to the costs.

By the agreement in August 1802, it was stipulated that the purchase-money should be paid by instalments, one-third on the 10th October 1802; one-third on the 5th January 1803; and the remaining one-third on the 5th April 1805, on a good title to the estate being then made.

The purchaser paid the first instalment, amounting to 5,333l. 6s. 8d. on the 10th October 1802, and the vendors have ever since had the same in their possession, and have also received all the rents and profits of the premises; the plaintiff, Mr. Todd, never having been let into possession of any part of the premises. An abstract was delivered in April 1803, and was returned by Mr. Todd, with the objections of counsel, before May 1803; and the principal objection taken to the title was, that the title could not be approved unless the necessary ac-

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counts were taken in a court of equity. The vendors insisted that the purchaser was not entitled to have the accounts taken; and instituted their suit in May 1804, to compel the purchaser to take the estate without having the accounts taken; they failed in that attempt, and Mr. Todd having subsequently instituted the second suit for the purpose of having the accounts taken, was resisted by the vendors, but succeeded.

The vendors then having been uniformly wrong, and the purchaser uniformly right, and the vendors having been in possession of one-third of the purchase-money, and in the receipt of all the rents and profits of the estate for upwards of fifteen years; the question is, upon what principle are the accounts to be taken? The usual rule is, that the purchaser is to have the rents, and to pay 4l. per cent. for his purchase-money. This rule (\*) is rather hard where the delay is not caused by the purchaser. The rents seldom yield 4l. per cent.; and the purchaser having been kept out of the enjoyment of the estate, receives it at last in a worse condition. In the present case, fifteen and a half years' delay has been caused by the resistance of the vendors; during that time they have had the enjoyment of nearly 6,000l. of the purchase-money (which in that period would be doubled); and have also received all the rents: to decree the usual accounts, would be to give the party who is wrong, all the advantage of the delay occasioned by himself: it would be to reward the party who has done wrong, and to give him a double benefit, and to work injustice to the party who has been uniformly correct. The cause is novel, there is no precedent. It may be said, that Mr. Todd might have applied to have the 5,333l. 6s. 8d. or the rents and profits, brought into Court and laid out, but he has not done so, and the vendors have reaped the benefit of his not doing so .- Under these circumstances, the vendors must account, not only for the rents and profits of the estate from October 1802, but also for interest, after the rate of 4l. per cent. upon one-third of the rents and profits.

As to costs. The original bill must be dismissed with costs, because the vendors, apprised of the objection, instituted an improper suit. As to the second suit. The vendors took no steps to amend the original bill, and to frame it properly to obviate the objection to the title. Mr. Todd had therefore no means of obtaining a specific performance of the agreement, but by the institution of the second suit; the vendors resisted and failed; Mr. Todd succeeded, and a specific performance was decreed. There was no inconsistency on the part of Mr. Todd. The will of Mr. Burton rendered it necessary that the accounts should be taken. All the parties to the second suit were interested in the accounts. The vendors must be at the expense of clearing the title, by taking the accounts; and, therefore, Mr. Todd is entitled also to the costs of the second suit.

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# No. XXII. (f)

# Duke of Bedford v. Trustees of the British Museum.

Mr. Shadwell thus stated the case to the Lord Chancellor .- The nature of the case is this; I can state it very shortly: Lady Rachael Vaughan, prior to her marriage with Lord William (\*) Russell, was seised in fee of the land on which the Museum now stands, which was parcel of another portion of land called Longfield and Babersfield; and she made a conveyance, by which she vested the legal estate of the whole of those lands in trustees, and also the legal estate of Southampton House, which was her own inheritance, in trust for her. She then married Lord William Russell, and by a deed dated 1675, to which she was a party as well as Lord William Russell and the trustees of the legal estate were parties, she and Lord William Russell and the trustees together were empowered by the deed to grant and convey the ground on which the Museum stood. By that conveyance to Ralph Montagu, Ralph Montagu covenanted, among other things in a general way, that he would not erect buildings on the ground which was conveyed to him, to the northward of the line of Southampton House. The covenant he made was a covenant not with the trustees in whom the legal estate was, but it was with Lady Rachael Vaughan and her heirs and assigns. That is the general nature of the case. After that Lord William Russell died, and the legal estate in the remainder of the land which had not been conveyed to Ralph Montagu, was re-conveyed by Lady Rachael Vaughan, and then by assignments and descents the legal estate of the land in the adjacent land, the Museum garden, has descended and become vested in the present Duke of Bedford. By the deed, which was a conveyance to Ralph Montagu, a rent was reserved of 51. annually, which has been paid by the present Duke of Bedford; and besides that, there was also a reservation of a rent of 3l. per day, in case any buildings should be erected in contravention of the covenant; and that rental of 3l. a day is secured by a power of entry and distress.

The question now arises whether, inasmuch as Southampton House has been pulled down and demolished, but on the site of it and on the land adjacent to the Museum gardens, houses have been built by the Duke of Bedford and his tenants, whether or not he has a right in equity to restrain the trustees of the British Museum from making buildings in the Museum gardens, contrary to the letter of the covenant which was made by Ralph Montagu with Lady Rachael Vaughan? That is the general nature of the case. When the case was heard be-

fore the Vice Chancellor, this difficulty occurred in his Honor's mind: he thought that the covenant was not a covenant which ran along with the land; that is, that inasmuch as the rent of (\*)51., which was the annual rent, was only reserved out of the land granted to Ralph Montagu; and inasmuch as the rent of 31. per day in the event of buildings being made, was only reserved out of the land granted to Ralph Montagu, that it could not be said that the covenant not to build on the land granted to Ralph Montagu, was a covenant that ran with the land which was not granted to Ralph Montagu; and therefore his Honor thought, that inasmuch as the covenant could not at all be said to run with the land, so that no action at law could be sustainable. He thought that a court of equity could not interfere to give the parties a more beneficial remedy and a more beneficial right than had been reserved to themselves by the form of the conveyance.

.The Vice Chancellor gave the following judgment: - This is an application to me on the part of the Duke of Bedford to grant an injunction to restrain the trustees of the British Museum from building on the land which they hold in that character to the northward of the ancient line of Southampton House; and the foundation of the application rests upon the grant which was made by the trustees of Lady Rachael Russell, and by her appointment to Mr. Ralph Montagu, who originally built Montagu House; and it is then said, that Ralph Montagu is to be taken to have covenanted with Lady Rachael Russell, her heirs and assigns, that he never would build to the northward of that particular line. Then that the trustees are about to infringe that covenant, and that this Court will interfere to restrain that infringement. The policy of the law of England does not allow that the owner of land, when he thinks fit to part with it, is to impose any captious restraint upon the lawful enjoyment of the land; and those who seek to enforce a covenant which affects to restrain a particular lawful use and enjoyment of land, must, according to the acknowledged principle of the law of England, show that they have some interest in that restraint, and that it is not for a captious or arbitrary purpose. The covenant is in terms made with Lady Rachael Russell and her heirs and assigns simply. In terms, therefore, it is a mere personal covenant. It is a covenant with Lady Rachael Russell and those who in all times after her should become entitled to receive the rent of 5l. a-year, which is one of the conditions of the grant in fee: and looking at the covenant according to those terms, the question would be, is the interest of the Duke of Bedford, as the heir or assign of Lady Rachael Russell in that 51. a year, to be materially affected by the erection of these intended buildings (\*)to the northward of the line of Southampton House? The question is, if the Duke of Bedford, as the heir or assign, was treating (\*363) (\*364)

simply in that character, could be establish in a court of justice that his interest in this perpetual rent of 5l. a year will be injured by the buildings now sought to be erected, because if he is entitled to an action at law for damages, he is necessarily entitled to the injunction of this Court to restrain that breach of covenant? It is not, however, contended in argument, that it is possible for the Duke of Bedford and for his counsel here to represent that his interest in this 5l. a year will be in any manner lessened by the buildings now sought to be erected, but on the contrary, it is perfectly plain that the erection of additional buildings would give an additional security, as it would give more value to the land, and of course not diminish the legal interest of the Duke of Bedford in that rent, and if it rested there, it certainly would not be contended here that it would be possible to call for the interference of this Court by way of injunction.

It is, however, said, that according to the true effect of this instrument, it is plain that the agreement of these parties with respect to these coverants was made not for the purpose of affording additional security for the rent of 5l. a year, but for the purpose of preventing such a use of this land, as should tend to diminish either the valuable or pleasurable enjoyment of the land adjoining—the valuable and pleasurable enjoyment of the land upon which Southampton House was built, and that the law will permit those restraints; so that I who am possessed of a particular property of which I have the personal enjoyment, that I have a right so to deal with land which belonged to me, and which is contiguous to mine; that I have a right so to deal with it, if I think fit to alienate it, as to restrain any use which may tend either to diminish the pleasure or the profit of the land which I retain.

The question, therefore, is, whether upon the whole of this deed it does appear that these covenants have been so framed as to afford evidence of an agreement that Mr. Ralph Montagu entered into with Lady Rachael Russell and those who represent her, as being the ownners of Southampton House and the land adjoining, that he would never use this land but in the manner prescribed, either to the prejudice of the profit or pleasure of Southampton House? If this deed does afford evidence of such an intention to the parties to the instrument, there is a (\*)clear remedy at law against the act which is now sought to be enforced, and, as I before observed, a clear remedy in a court of equity by way of injunction to restrain the commission of that act.

The consideration, therefore, is, as I first suggested to the bar, as to what would ultimately appear to be the real question between the parties, whether this deed does or does not afford evidence of an agreement not between Lady Rachael Russell and Mr. Montagu personally, but between Mr. Montagu and those who claim under him the sub-

ject of the grant, and between Lady Rachael Russell and those who claim under her Southampton House and the site of that house. It did appear to me the first moment the case was opened, that such ultimately must be the question in this case. It has been argued with all the ability and ingenuity which the bar could afford-after all the research that the authority of the Court could afford, but I confess the principle remains untouched in my mind. If this deed does afford evidence at law that such was the agreement of these parties, then this Court will follow the law, and will act upon the same agreement, and will interfere to prevent the commission of the act. But if a court of law declares that this deed affords no evidence of such an agreement, I cannot admit the principle that a court of equity can read this instrument to have a different effect than a court of law. A court of equity cannot say, that although a court of law has declared that the instrument affords no evidence of an agreement, that it will, upon the facts stated, collect that the intention of the parties was to that effect, or act upon the facts thus specified. My opinion is, that a court of equity, in the construction of an agreement, must follow the law; and if at law the construction is the same as in equity, its powers will be given for a different purpose, namely, for the purpose of restraining injury, and not of giving damages. I must, therefore, according to my view of the case, send the question to a court of law to determine what the intention of the parties really was; but I will relieve the parties from any disability or obstruction they may receive in a court of law in respect of the form of this covenant; and whatever the parties may feel will facilitate the real decision of the question at law, I will take care to afford them. I will take care that they shall have every facility to enable a court of law to decide the actual question that is meant to be submitted.

(\*) Lord Eldon ultimately decided, that under the circumstances, the acts of the parties, the alteration of the property, &c. the right to relief in equity was at an end.

## No. XXIII.

# Rea v. Williams, (Exch.)(g).

The plaintiff Rea and one Pritchard purchased jointly a lease made by the Duke of Beaufort for the life of another person, and they jointly took the profits of it for some time; but afterwards they conveyed the estate to the defendant Williams, in consideration of 300h, as was expressed in the conveyance, though no part of the money was ever paid, and Williams acknowledged by his answer, that he was a mere trustee

for the parties; but no declaration of trust was ever executed, nor did it any way appear with what view the estate was vested in the defendant, any further than it was believed it was done to screen it from execution, they being both of them much indebted. Afterwards Pritchard died intestate, and the defendant Williams took out administration to him, but there was not assets enough to pay all his debts. This cause came on to a hearing on the bill and answer, and the question was, whether the trusts of the estate belonged to Rea the survivor, as the whole estate indisputably would, if the legal estate had continued in the two purchasers? To prove the trust would survive, were cited 1 Vern. 217; Eq. Cas. Abr. 291; 2 Vern. 556, 683.

Mr. Wilbraham, to show this trust did not survive, took a distinction between 2 Vern. 556, and the present case; for there, he said, was an express limitation of the trust to the two daughters, so they might take jointly; but this is a resulting trust only, and no express limitation; and equity, which discourages joint tenancies, may construe that to be a tenancy in common; Salk. 158. If a joint tenant for years mortgages his part of the term, this is a severance of the joint tenancy, 2 Vern. 683.

Reynolds, Chief Baron.—I think the joint tenancy of the trust in this case was not severed: every one who has an estate has two rights in him, a legal estate and an equitable interest; nothing passed by the conveyance to the defendant but the legal estate, and the equitable interest resided in the two purchasers, and (\*) remained as it originally was, the consequence of which is, that it must go to the plaintiff by survivorship. Carter, Thompson and Fortescue were of the same opinion; and Fortescue said, he saw no difference between an express and an implied trust.

#### No. XXIV.

# Lechmere v. Lechmere(h), Ch. E. T. Geo. II.

This case was elaborately argued upon the appeal. The argument lasted four days. Upon the first question Lord Talbot delivered his opinion at considerable length. Upon the second question he pronounced the following judgment:

The second question is as to the satisfaction, whether what descended to the heir at law is to be considered as a satisfaction of what he is entitled to under this covenant. As to questions of satisfactions where they are properly so, they have always been between debtor and creditor or their representatives. As to Mr. Lechmere I do not consider

him as a creditor, but as standing in the place of his ancestor, and thereby entitled to what would have vested in his ancestor. A constructive satisfaction depends on the intention of the party, to be collected from circumstances. But then the thing given must be of the same kind, and of the same or a greater value. The reason is plain, for a man may be bountiful as well as just; and if the sum given be less than the debt, it cannot be intended as a satisfaction, but may be considered as a bounty; and if the thing given is of a different nature, then, also, as the intention of the party is not plain, it must be considered as a bounty. But I do not think the question of satisfaction properly falls within this case, for here it turns on what was the intention of my Lord Lechmere in the purchases made after the articles, for as to all the estates purchased precedent to the articles, there is no color to say, they can be intended in performance of the articles; and as to the leasehold for life, and the reversion in fee expectant on the estates for life, it cannot be taken they were purchased in pursuance of the articles, because they could not answer the end of them. But as to the other purchases (in fee simple, in possession, &c.) though considered as a satisfaction to a creditor, yet they do not answer, because they are (\*)not of equal or greater value. Yet why may they not be intended as bought by him with a view to make good the articles? The Lord Lechmere was bound to lay out the money with the liking of the trustees, but there was no obligation to lay it out all at once, nor was it hardly possible to meet with such a purchase as would exactly tally with it. Parts of the land purchased are in fee simple, in possession, in the south part of Great Britain, and near to the family estate. But it is said they are not bought with the liking of the trustees. The intention of naming trustees was to prevent unreasonable purchases, and the want of this circumstance, if the purchases are agreeable in other respects, isno reason to hinder why they should not be bought in performance of the articles. It is objected, that the articles say the land shall be conveyed immediately. It is not necessary that every parcel should be conveyed so soon as bought, but after the whole was purchased, for it never could be intended that there should be several settlements under the same articles. Whoever is entitled to a performance of the covenant, the personal estate must be first applied so far as it will go, and if the covenant is performed in part, it must make good the deficiency. But where a man is under an obligation to lay out 30,000l. in lands, and he lays out part as he can find purchases which are attended with all material circumstances, it is more natural to suppose these purchases made with regard to the covenant than without it. When a man lies under an obligation to do a thing, it is more natural to ascribe it to the obligation he lies under, than to a voluntary act, independent of the obligation. Then (\*368)

as to all the cases of satisfaction, though these purchases are not strictly a satisfaction, yet they may be taken as a step towards performance. and that seems to me rather his intention than to enlarge his real estate. The case of Wilcox and Idem, 2 Vern. 558, though there are some circumstances that are not here, yet it has a good deal of weight with There the covenant was not performed, for the estate was to be settled, but the land was left to descend, and a bill was brought to have the articles made good out of the personal estate; to which it was answered, that the 200l. per annum was bought, which descended to you. It is true a settlement hath not been made, but they were bought with an intention to make a settlement, and you can make one. same will hold as strong in the present case, that these lands were bought to answer the purposes of the articles, and fall within that compass(\*, and it is not an objection, to say they are of unequal value, for a covenant may be executed in part, though it is not so in satisfaction: and in this particular I differ from the Master of the Rolls. There must be an account of what lands in fee simple in possession were purchased after the articles entered into, and so much as the purchase-money of such lands amounts to must be looked on in part of satisfaction of the 30,000l. to be laid out in land under the articles, and the residue of the 30,000l. must be made good out of the personal estate.

### No. XXV.

Abstract of the Special Verdict, in Fairfield v. Birch (i).

Edmond Kelly, being seised in fee in 1747, made a settlement before his intended marriage, in consideration of the wife's portion, as to part to trustees in fee, in trust to sell and pay off incumbrances which amounted to 4,000l. As to the residue, to himself for life, remainder to trustees in the usual way, to preserve remainders; remainder to the use, that the wife might receive a jointure rent-charge, in bar of dower; subject thereto, to the first and other sons of the marriage successively in tail-male; remainder to the first and other sons of Edmond Kelly, by any other wife, successively in tail-male; remainder to two brothers of the settler and their issue male in strict settlement; remainder to Ignatius Kelly, the uncle of the settler for life; remainder (after a limitation to trustees to preserve) to his first and other sons successively in tail-male, with the reversion to the settler's right heirs. Power to the settler if he survived his wife, having issue by her a son, to jointure any after-taken wife, to the extent of 50l. a year; and if no issue male, of

100l. a year; and if no issue, 150l. a year, and 2,000l. for younger children's portions. Covenants for title and further assurance. Power to the settler to charge 500l. but not to affect the jointure. Proviso, that if the settler and his brother should die without issue, the estates should stand charged with 2,000l. for the sisters of the settler, or their issue.

The lands vested in the trustees in fee, were sold to Robert Birch, under a decree for the payment of the incumbrances, which were accordingly paid out of the purchase-money.

(\*)Robert Birch had notice of the settlement of 1747, in the year 1755.

Ann Kelly died in the lifetime of Edmond, previous to the 2d May 1758, without having had issue.

Edmond, on the 2d of May 1758, on his marriage with Harriet Hincks, in consideration of a portion of 2,500l., settled the estates to himself for life, remainder to trustees to preserve, remainder to the intent that the intended wife might receive a jointure rent-charge of 300l. per annum, if there should be issue, and subject thereto, to the first and other sons of the marriage successively in tail-male; remainder to Edmond the settler in fee.

15th July 1761, Edmond, for a valuable consideration, conveyed to Robert Birch the settled estates in fee. Part of the consideration the jury found to be the debts for which the estates under the decree had been sold.

The brothers of Edmond died in his lifetime unmarried, and without issue.

The lessor of the plaintiff was the grandson of Ignatius, the uncle.

Edmond, the settler, died in 1768, without ever having had issue.

The lessor of the plaintiff claimed under her father, Robert Birch's will, and was entitled to a portion under a term of years, created by his marriage settlement, which was made in consideration of his intended wife's portion.

## No. XXVI.

Sloane v. Cadogan. Rolls, December 1808(k).

Under a settlement made previously to the marriage of Earl Cadogan and Frances, his wife, the sum of 20,000l. was assigned to trustees upon certain trusts, under which, William Bromley Cadogan, one of

the children of the marriage, became entitled, subject to his father Lord Cadogan's life interest therein, to one fourth share of the 20,000l., which sum was afterwards invested in the 3 per cent. reduced annuities, in the trustees (\*) names. By an indenture, bearing date the 26th May 1788, William Bromley Cadogan assigned to William Rose, William Bulkley, Duncan Stewart, and Alexander Graham, their executors, administrators and assigns, all such part, share or proportion, as he the said William Bromley Cadogan was entitled to as aforesaid, expectant on the decease of the Earl, his father, of and in the said sum of 20,000l. and all the interest which after the decease of the Earl should become due in respect of such share, To hold the same immediately after the death of the said Earl, and subject to his life estate or interest therein. in the mean time, unto the said William Rose, William Bulkly, Duncan Stewart, and Alexander Graham, their executors, administrators and assigns, upon trust, immediately after the decease of Lord Cadogan, by and out of the first monies which should be received by, or come to their hands, by virtue of the same indenture, to pay 1,000l. to such person or persons, and for such uses, intents and purposes, as he the said William Bromley Cadogan should, by any writing or writings under his hand, direct or appoint; and, in default of such direction or appointment, then to pay the said sum of 1,000l. unto the said William Bromley Cadogan, or his assigns, to and for his and their own use and benefit. And upon trust, to place out or invest the residue or surplus of the said monies and premises, as soon as might be, after the same should be received by them the said trustees, in such stocks, funds, or securities as therein mentioned; and to stand possessed of all the said residue of the said trust monies which should remain after payment of the said sum of 1,000l. and of the said stocks, funds or securitis; upon trust to pay unto or authorize the said William Bromley Cadogan and his assigns, to receive the interest, dividends, and annual produce, for life; and after his decease, and in case his wife, the plaintiff, should be then living, upon trust to pay unto or authorize her and her assigns to receive the interest, dividends, and annual produce thereof for her life, for her and their own use and benefit, the same to be in lieu of dower; and immediately after the decease of the survivor of the said William Bromley Cadogan and plaintiff, upon trust to pay, assign and transfer the said residuum, and the stocks, funds, or securities for the same, in such manner for the benefit of the issue of the marriage between them the said William Bromley Cadogan and plaintiff, as therein mentioned; and "for default of such issue, (\*) upon trust to pay, assign and transfer the same to such person or persons, and upon such trusts, for such uses, intents and purposes, and by, with, under and subject to such powers, provisos, charges, conditions, and limitations over, as he the said Wil418 APPENDIX.

liam Bromley Cadogan, at any time or times during his life, by any deed or deeds, writing or writings, with or without power of revocation, to be sealed and delivered in the presence of, and attested by two or more credible witnesses, or by his last will and testament in writing, or any writing in the nature of, or purporting to be his last will and testament, to be by him signed and published, in the presence of, and attested by such and the like number of witnessess, should direct, limit or appoint; and in default of such direction or appointment, or in case of any such, and the same should not be a complete disposition thereof, then upon trust to pay, assign and transfer the said residue, and the stocks, funds or securities for the same, or so much thereof whereto any such direction or appointment as aforesaid should not extend, to the said Earl Cadogan (his father), his executors, administrators and assigns, to and for his and their own use and benefit. And, in the same indenture is contained a proviso empowering the said William Fromley Cadogan and his wife, the plaintiff, at any time during their joint lives, to revoke the said trusts, or any of them, and to appoint or limit new or other trusts in the manner therein mentioned. The 3 per cents, were sold, and the produce lent to the Earl in 1786, upon real security, by-way of mortgage.

William Bromly Cadogan, on the 11th May 1789, made his will, which was signed and published by him in the presence of and attested by two credible witnesses, and thereby directed his executrix to sell a leasehold estate at Reading; "and as to the money arising from the sale thereof, I give the same to my executrix; and as to all the rest and residue of my estate and effects whatsoever, I give and bequeath the same to my dear wife Jane Cadogan." And he appointed her his sole executrix. And the said testator shortly afterwards made a codicil to his will, which was not attested, in the words following: Whereas, by marriage settlement, I have given to my dear wife Jane Cadogan for her life, the whole interest of the moiety of my mother's fortune which was settled upon me, as will appear by the settlement itself, reserving to myself 1000l. for my own private use. And whereas I borrowed at Midsummer 1789, of Mr. (\*) William May, of Bingfield Mill, the sum of 600l. at 41 per cent. interest, and gave as security for the same the joint bond of myself, the Rev. Mr. Bulkley, and Mr. William Simmonds Higgs, of Pangbourn-lane, Reading; I hereby direct, that the above-mentioned 1,000l. be appropriated to the discharge and payment of the said bond; and if it should be convenient to my dear and honored father, the Right honorable Lord Cadogan, to pay the said sum of 600l. to the aforesaid Mr. May, of Bingfield, and to take to himself the 41 per cent. interest, and deduct the whole principal and interest out of the moiety of my mother's fortune, which comes to me and my heirs at his decease, I shall esteem it a great favor added to the many I have (\*373)

received from him before. And the testator afterwards made a codicil to his will, also not attested, in the words following: In November 1790, Lord Cadogan was so kind as to pay the above-mentioned 600l. for me to Mr. May, of Bingfield, by the which fatherly act of goodness, added to many others of the same kind, I am freed from all debts and incumbrances whatever, excepting an annuity of 10l. a year, which I am engaged to pay to Mrs. Warsand, Mrs. Cadogan's aunt, now living at Paradise-row, Chelsea, for her life; and also to pay the expenses of her funeral.

There was no child of the marriage between the testator and his wife. The testator did not, in his lifetime, in any manner, execute his general power of appointment in the indenture of 26th May 1783, or his power of appointment of the said sum of 1,000l. unless by his will; nor did he, together with the plaintiff, execute their joint power of revocation therein contained.

The plaintiff claimed to be entitled to one fourth part of the 20,000l., and the bill was filed against the executors of the Earl of Cadogan, to establish her right.

The defendants, in their answer, stated, that the Earl paid off the 600l. and interest, mentioned in the codicils, and they submitted, that they became entitled to be repaid such sum out of the 1,000l.; and they claimed to be entitled to the whole of the fourth share of the said William Bromley Cadogan, subject to the plaintiff's right to the interest for her life (save and except the aforesaid 1,000l. part thereof.) under the indenture of 26th of May 1783.

Mr. Richards, Mr. Stephen, Mr. Bowdler, and Mr. Sugden, for the plaintiff. The argument of the latter, which in a great (\*)measure was a repetition of the arguments before urged, is the only one of which he is enabled to give the reader a full note.

It was to the following effect:-

The first question is as to the 600l. The defendants might as well contend that they are entitled to an account of every sum advanced by the Earl to his son. In every case, between a father and child, a provision by the father is deemed an advancement for the child, on account of the connection of blood. If a father purchase in the name of a child, primâ facie, it is an advancement for the child, and the evidence to rebut this lies on the father; whereas, if a purchase be made in the name of a stranger, the presumption is otherwise, and the evidence to rebut it lies on the stranger. Besides, if the question here was between strangers, payment might be pleaded although twenty years have not yet elapsed. Lord Mansfield laid it down that sixteen, eighteen or nineteen years were sufficient whereupon to found the presumption of payment (Mayor of Hull v. Horner, Cowp. 109; Oswald v. Leigh- 1 T. Rep. 270), and (\*374)

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Lord Erskine so considered the rule (Hillary v. Waller, 12 Ves. 266). And even if payment would not be presumed, yet a jury would, in this case, be directed to find a release. (Washington v. Brymer, App. to Peake's Evid.)—[This point was given up by the defendants.]

The principal question, however, is, whether the power is executed; and first, whether it is executed by the will alone? I must admit, that in general a sweeping disposition, however unlimited in terms, will not include property over which the testator has merely a power, unless an intention to execute the power can be inferred from the will. But great Judges have disapproved of this rule. Lord Alvanley, in Langham v. Nenny, 3 Ves. jun. 467, wished that the rule had been otherwise, and that it had been held that a general disposition would operate as an execution of the power; and in Hannock v. Horton, 7 Ves. jun. 391, Lord Eldon said, that he was not sure that the rule, as now established, did not defeat the intention nine times out of ten. In favor of the rule it has been said, that to overturn it would be to destroy the distinction between power and property. That I deny. The marked and only material distinction between power and property is, that in the case of absolute property, although the party make no disposition of it, yet it will descend to his representatives; whereas a person must actually execute (\*) his power, or the fund will go over to the person to whom it is given in default of appointment. But why should not the same words operate as an execution of the power which would pass the absolute interest? Where is the distinction as to the purposes of disposition between a general power like this and the absolute interest? If the solemnities required by the power are adhered to, it would startle a man of common sense not versed in legal subtleties to understand so refined a distinction. As therefore the rule stands upon no principle, and has been regretted by great Judges, the Court will be anxious to distinguish cases, and not to consider every case as within this general rule. Now there not a single case in the books which governs the present. Ours is a peculiarly strong case. The gift to the Earl in default of appointment was without consideration, and the parties had a power of revocation. The persons who prepared the settlement did not understand the distinction between power and property. They gave the 1,000l. to such persons as Mr. C. should appoint, and in default of appointment to him and his assigns. There the power was merely nugatory: it was not larger than the gift, nor differed from it in effect. Besides, here the property moved from Mr. Cadogan; the settlement as to the Earl was merely voluntary, and the power was part of Mr. Cadogan's old dominion, and consequently the execution of it must receive a favorable interpetation. In this respect all the cases are distinguishable. Moulton v. Hutchinson, 1 Atk. 558; Andrews v. (\*375)

Emmott, 2 Bro. C. C. 297; Buckland v. Barton, 2 H. Blackstone, 130; Croft v. Slee, 4 Ves. jun. 60; Nannock v. Horton, 7 Ves. 391; and Bradley v. Westcott, 13 Ves. 445, are all cases where the power was given by one person to another, and cannot be compared to our case. where the power was reserved by the party over his own property. There are two cases, I must admit, where nearly the same circumstances did occur. Ex parte Caswall, 1 Atk. 559; Bennet v. Aburrow, 8 Ves. 609. But the first case came on merely upon a petition; and Lord Hardwicke said he would not say what his opinion would be if it came on upon bill and answer. Besides, Lord Hardwicke overruled this case by a later determination, as I shall presently show. In the last case the property in default of appointment was given to the next of kin, which may be thought to distinguish it from ours. But if there is no authority against the plaintiff, there are two very considerable cases in her favor. The first is (\*) Maddison v. Andrews, 1 Ves. 57. There a man made a settlement, reserving to himself power to charge, limit, or appoint the estate with any sum not exceeding 1,000l. By his will, without making the slightest reference to his power, he gave some legacies, and then charged all his estate with the payment of his debts and legacies. Lord Hardwicke held that the power was part of the old ownership; and that it was but a shadow of difference that he had charged all his estate; whereas this was before settled to uses, for these powers to the owner were to be considered as part of the property. Now this is precisely our case, and to decree against the plaintiff your Honor must overrule Lord Hardwicke's decision. The other case is Standen v. Standen, which has been already so justly relied on. It is impossible to read that case without seeing that Lord Rosslyn would have decided it on the ground of the power being equivalent to the ownership, even if the circumstance had not occurred to which the decision is generally referred-that the testatrix had no real estate except what was subject to the power. And yet in that case the power was a gift by a will from a husband to his wife, and was not, as in our case, a part of the donee's old dominion.

But if the will of itself is not an execution of the power, that and the codicil taken together certainly are. The operation of a codicil even in respect of real estate is to republish the will, and pass after-purchased estates, although not noticed, if executed according to the statute of frauds. Piggott v. Waller, 7 Ves. jun. 98. And where, as in our case, new matter is introduced, it forms an integral part of the will, in the same manner as if it had actually been inserted in the will at the time of its execution. And on this ground a codicil may explain a doubtful expression in the will, or may give an estate by implication, where the testator refers to what he supposes he has done by his will, although the disposition in the will is (\*376)

not what he states it to be. Hayes v. Foorde, 2 Blackst. 698; Beable v. Dodd, 1 T. Rep. 193. In our case the words in the will are sufficient, if an intention appeared to execute the power, and as such an intention does appear by the codicil which forms part of the will, they both together amount to an execution of the power. It is impossible to misunderstand the words in the codicil, "which comes to me and my heirs at his decease." They admit of but three constructions:-1st. He considered the fund as having (\*)passed to his devisee, who was his hares factus: or 2d, he adverted to its going to his hæres natus, or child under the settlement: or 3d, he looked to the event of its going to his father, the Earl, in default of appointment. The 2d cannot be the right construction; for if there was issue to take the fund, their right would prevail over the testator's, and the Earl could not retain his debt out of a fund which would in that event belong to them. The last construction is absurd: it would amount to a request, as has been already shown, to a man to pay himself a debt out of his own money.—But he considered the property as having passed to his wife; and as he knew that it was in the hands of his father, who had a life-interest in it, he requested him to retain the money out of it, and not to let his wife be troubled for it till the property given to her fell into possession. This then clearly establishes the first construction. Our case must not be compared to Holmes v. Coghill, 7 Ves. 429, 12 Ves. 206; for there the power executed by the will was discharged before the execution of the codicil.

It will, however, I suppose, be objected, that the codicil is not attested, and consequently cannot be deemed an execution of the power. But it is sufficient where a power is executed by several instruments, that the principal one is duly executed. Earl of Leicester's case, I Ventr. 278. The will and codicil amount together to an execution of the power. But I need not insist upon this, because the plaintiff being a wife is entitled to have the defect in the execution supplied; and it is not material that she is in part provided for, because the husband is the judge of the quantum of provision; nor is it material that the provision was made after marriage, although to constitute a good settlement of realty, as against a purchaser, a settlement after marriage is merely voluntary. Fothergill v. Fothergill, 2 Freem. 256; Hervey v. Hervey, 1 Atk. 561; Churchman v. Harvey, Ambl. 335.

But strong as these grounds are, they are not the only ones upon which the plaintiff's case may be rested. I mean to contend, that the supposed settlement of Mr. Cadogan was merely tantamount to articles, that the gift to the Earl was voluntary, and consequently, cannot be enforced by this Court, and that it is immaterial that the funds are now actually vested in the executors of the Earl. I may admit, that if we asked the

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Court to execute the articles they must be executed in toto. But we (\*) do not require the aid of the settlement to support our title; we are content to take this fund as part of Mr. Cadogan's property discharged from this settlement. To constitute an actual settlement, so as to enable a volunteer to claim the benefit of it, it is absolutely necessary that the relation of trustee and cestui que trust should be established. Here Mr. C. did all he could; but that is not enough. He could not make an actual transfer. The trustees in whom it was vested would not have been authorized in transferring it of their own authority to the trustees of Mr. C.'s settlement. If a man is seised of the legal estate, and agree to make a voluntary settlement, it cannot be enforced. Can it make any difference that the legal estate happens to be outstanding? Certainly not. As the settlement therefore was not completely perfected, the Earl could not enforce it. It will not be pretended that there is any consideration as between a child and father, which will call for the interference of this Court. The father is as a mere stranger. It was so as to covenants to stand seised; and this Court does not even advert to every consideration which is sufficient to raise a use under a covenant to stand seised. In Stevens v. Trueman, 1 Ves. 73, where an agreement by a child, to settle an estate in the events which had happened on her father, was enforced, it was not even hinted that there was any consideration as between the child and father; but the decision was grounded on the gift by the father of 500l. the child. And in all the cases on this subject, it will be found that the decisions proceeded on the ground of some consideration given for the settlement on the strangers. Goring v. Nash, 3 Atk. 186, was the mere case of a settlement by a father on his younger daughter. Osgood v. Strode, 2 P. Wms. 245, was an actual purchase by the grandfather of the limitations to his grand-children. Vernon and Vernon, in the same book, 594, turned upon someting like a moral consideration. Lord Chancellor King did not consider it a voluntary convevance, 2 Kel. Cha. Ca. 10. Besides, there the Court relied upon the covenant which might be enforced at law; and, therefore, to prevent circuity, they enforced a performance in specie. But even that doctrine is now overruled; Hale's case, Ch. 1764; and in our case there is no covenant. The general doctrine in these cases is recognized in Colman v. Sarrell, 1 Ves. jun. 50; followed by Ellison v. Ellison, 6 Ves. jun. 656. In this case, it is not material that the fund is actually vested in (\*) the defendants; because it is vested in them in a different right.—This Court will never permit a mortgagor under a settlement to claim the fund in a different character. In Ellison v. Ellison, Lord Eldon considered, that when the relation of trustee and cestui que trust was actually raised, although the settlement was voluntary, it was not material that the fund had, by the effect of accident, got back to the settler, as if (\*378) (\*379)

the trustee of stock should make the settler his executor. Now, the converse of this proposition must equally hold good, and that is our case.—It is like a late case before your Honor, where a legacy was given to a married woman by a will, and the husband was made executor, and received the legacy; and your Honor held, that he had not reduced it into possession, so as to prevent his wife's right by survivorship. And why? Because he had received it as executor, and not in his marital right. The characters were totally distinct. That decision must govern our case.

Sir Samuel Romilly and Mr. Raithby for the defendants:-

To hold the will to be an execution of the power would be to overrule all the cases on residuary bequests. The case of Madison v. Andrew decides nothing more than that where a man has a general power of appointment, the fund shall be subject to his debts, which has long been the law of this Court. [Master of the Rolls.—But there, as in this case, the estate was settled subject to the power. At any rate that case is not now an authority. As to the codicil, it is said, that the defect may be supplied; and so it may in common cases, but here it cannot be looked at, as it is not attested; because, here no intention appears to execute the power on the face of the instrument. A clear intention must appear, before the Court can aid the defect. The codicil is against the plaintiff. It shows that he forgot there was any power. thought, in default of issue, the property would revert to him. And, if he forgot his power, the Court cannot hold that this will pass under a bequest of property. The plaintiff admits that the will of itself would not be an execution of the power, and the codicil amounts to nothing; for this is the case of a non-execution, and not of a defective execution. As to the point upon the settlement being voluntary, if it be correct, it cannot be acted upon in this case, because the plaintiff states the settlement, and grounds her title upon it. The question is not made by the bill, and (\*) cannot now be gone into, even admitting that the law is as stated; whereas, here the fund is actually assigned, and the defendants do not require the assistance of the Court to defend their

Mr. Richards in reply :-

The limitation to the Earl of Cadogan was merely voluntary; it was a mark of respect to him; but, in point of law, he was a mere stranger. He could not have required a subpæna against our trustees. And, in fact, the defendants are asking relief, as they want to retain the fund, although they are bound to re-assign it in their character of mortgagors. [Master of the Rolls.—Lord Cadogan could not have come here, requiring Mr. Cadogan to give him a better security for the money. But here did Lord C. stand in need of any other aid? The assignment (\*380)

was as good an assignment as could be made of this reversionary interest. You may be a trustee for a volunteer.] Upon the will and codicil taken together, there can be no doubt but that this power was duly executed. The words in the codicil admit of no other meaning than that the property was given to his wife by his will.

Master of the Rolls having taken time to consider:--

Two points were made on the part of the plaintiff; 1st, that it was necessary that the husband should execute the power. But, 2dly, if it was, that his will did amount to an execution of it. As to the first, it was said that the gift to Lord Cadogan was merely voluntary, and Lord C. could not have had any assistance from this Court: that the question is the same as if the representatives were parties seeking relief, as the circumstance of his executors having the money makes no difference, and I think that that circumstance is immaterial. But, as against the party himself, and his representatives, a voluntary settlement is binding. The Court will not interfere to give perfection to the instrument, but you may constitute one a trustee for a volunteer. Here the fund was vested in trustees: Mr. W. Cadogan had an equitable reversionary interest in that fund, and he has assigned it to certain trustees, and then the first trustees are trustees for his assigns, and they may come here, for when the trust is created no consideration is essential, and the Court will execute it though voluntary.

Then the question is as to the power. The will, it was hardly contended, although attested, would amount to an execution of (\*)the power. The circumstance of the attestation has been held not to be material. and it is now settled that a general disposition will not include property over which the party has only a power, unless an intention appear. it is said, here is a codicil which will amount to an execution. For this no authority was cited; and I am not aware that the conception of the testator, of his power over his property, is ever referred to, except for the purpose of election. But here the question is upon an execution of a power. This point, however, is immaterial, as the codicil does not establish the testator's intention; he uses expressions descriptive only of the interests which his mother's settlement gave him in the fund, but that does not show that he meant to exercise the power. It is quite evident that he had not forgot his power: Here he remembered the settlement, and states that he had an absolute power over the 1,000l. The request is not evidence that he might not consider that Lord C. would not, in some event, become entitled to the property. But here he meant only that the money should be deducted out of the 1,000l. The codicil does not show that he considered all the property was his, which is necessary; and I should conclude the contrary. The bill must be dismissed as to this fund.

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## No. XXVII.

Bury v. Bury(1), Ch. 11th July 1748.

Sir Thomas Bury being seised of a freehold estate, and also possessed of a leasehold estate, on the marriage of his son, Thomas Bury, by lease and release, 3d and 4th January 1725, settled the freehold estate on himself for life; remainder to his wife for life; remainder to Thomas, his son, for life; remainder to his intended wife for life; remainder to his first and other sons in tail-male, with remainder to plaintiff for life, with remainder to his first and other sons in tail-male; with remainder over: and the leasehold premises were assigned to trustees, to raise money to renew the lease, then to pay the rents to Thomas, the son, for his life; remainder to his intended wife for her life; remainder to his first and other sons; remainder to the trustees, to pay the rents plaintiff for his life; remainder to his first and other sons, with remainder over.

(\*) The marriage took effect; the wife died without leaving any issue male. Sir Thomas died.

Thomas Bury, on his second marriage with the defendant, having renewed the lease, by indenture, dated 31st Dec. 1736, settled the lease-hold premises to himself for life, remainder to his second wife, the defendant, for life, with remainders over; and therein taking notice, that the said Thomas Bury was seised for the term of his natural life with the power of jointuring in the said freehold lands, did, for enlarging the jointure, grant the same to her, for life, with remainders over.

The marriage took effect. Thomas Bury died without leaving any issue male, either by his first or second wife; so that the plaintiff became entitled to the leasehold premises, by virtue of the settlement made on Thomas Bury's first marriage. The bill was brought against the second wife for an account of the rents and profits of the leasehold premises, and to have all deeds and writings relating thereto delivered up.

The defendant denied that she had any notice of the deeds 3d and 4th Jan. 1725, or that there was any settlement of the leasehold premises, or that any such deed was delivered to her with the rest of the writings. There was only one witness who had-proved he had been employed to look over the title for Thomas Bury and defendant; and that amongst the papers he had seen a foul draft of the former settlement, and that there was no power of jointuring in the leasehold premises, which he told Thomas Bury of.

Lord Chancellor .-- There are two questions: 1st, Whether she had

notice? 2dly, if no notice, Whether she can protect herself under the lease renewed by her husband?

As to the 1st, there is no positive evidence of notice: she denied it by her answer, and there being only one witness against that answer, a decree cannot be made upon that one witness's testimony. Where an agent has been employed for a person in part, and not throughout, yet that affects the person with notice: here the recital in the deed of the power of jointuring was sufficient to have made defendant have inquired into it, and therefore shall affect her. In Le Neve v. Le Neve she admitted Norton was her agent; and so that differs from this case.

As to the 2d, There was no surrender of the former lease, for the legal estate was in trustees, and therefore the Court is to (\*)judge only as between cestui que trust; and though the lease was renewed by T. Bury, yet it must follow the trust of the whole term, and he can have no contribution for what he paid, for he enjoyed it during his life. If a lease or deed is wrongfully given up or destroyed, you may give evidence of the purport of the deed, or have a discovery from the granters.—Decreed, that no alteration was made in the former trusts by Thomas's renewal of the lease.

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## INDEX.

In order to avoid repetition, the points have been arranged under the heads to which they appeared principally to belong, and references have been made to the principal heads from every other title to which it was thought a reader would refer for any particular point.

To give an instance, under the head, Bankruptcy, Act of, the reader is referred to "Notice," where he will find, whether or not an act of bankruptcy is notice to a purchaser.

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